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UNITED STATES DEPARTMENT OF AGRICULTURE

DEPARTMENT BULLETIN No. 1106

Washington, D. C.

October 23, 1922
Revised April, 1923

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LEGAL PHASES OF COOPERATIVE ASSOCIATIONS

By

L. S. HULBERT, Assistant in Cooperative Marketing
Bureau of Agricultural Economics

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By L. S. Hulbert,

Assistant in Cooperative Marketing,[1] *Bureau of Agricultural Economics.*

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FOREWORD.

It is the purpose of this bulletin to discuss some of the legal questions with respect to the organization, conduct, and operation of

[1] In view of the widespread interest in the legal phases of cooperative marketing, stimulated by the passage of the Capper-Volstead Act, this exhaustive study has been made of the legal phases of the subject by an investigator who not only has had several years of actual legal practice, but has had opportunity to make an intensive study of the economic side of cooperative marketing.

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cooperative associations. These questions will be considered from the standpoint of incorporated associations with capital stock, incorporated associations without capital stock, and unincorporated associations.

INCORPORATED ASSOCIATIONS OR CORPORATIONS.

NATURE AND CHARACTERISTICS.

A point to be made clear at the outset is that an incorporated cooperative association, whether formed with or without capital stock, is a corporation just as much as an incorporated organization formed to manufacture automobiles, farm implements, or steel. It is true that incorporated cooperative associations are a particular type of corporation, just as incorporated commercial concerns or charitable organizations are particular types. As nearly all cooperative associations are incorporated, and as it is highly desirable, as a rule, that they should be, the greater part of this bulletin will be devoted to a consideration of incorporated associations, and whenever the word "association" is used herein, unless otherwise specified, an incorporated association is meant.

Under the circumstances a discussion of some of the characteristics of corporations will be in order. These characteristics, it will be kept constantly in mind, are the characteristics of incorporated cooperative associations, as well as of other corporations. The term "incorporation" is used with reference to corporations which do not have capital stock as well as to those which have capital stock. It describes the act of creating a corporation. A corporation is an artificial entity created by the law; it is a creature of the law. The definition of a corporation which is probably more widely employed in this country than any other is that given by Chief Justice Marshall in the Dartmouth College case,[1] where he defines a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of the law."

The existence of a corporation is separate and apart from the stockholders or members who are interested in it.[2] Just as Smith and Jones are different persons, so a corporation is a legal entity distinct from its stockholders or members. Individuality, if the term may be employed, is the dominant distinguishing quality of a corporation. The stockholders or members of a corporation, as well as its officers and directors, may change constantly, but the existence of the corporation is not affected thereby. It lives on as unaffected by these changes as a man is unaffected by changes of clothing. As an engine is separate from the engineer who runs it, so a corporation is separate from its stockholders. The stockholders do not have title

[1] Dartmouth College *v.* Woodward, 4 Wheat. 518.
[2] Aiello *v.* Crampton, 201 Fed. 891.

to the property of a corporation. They can not transfer the legal title thereto, although all of them join in the execution of papers purporting to transfer the property.[3] It can be done only through the proper officers or agents of the corporation. If one man acquires all the stock of a corporation, the title to the property of the corporation is not in him, as he can not sue in his own name for damages to the property, nor can he thus transfer title to it.[4] A stockholder as such is not an agent of the corporation.[5] A stockholder or member of a corporation has no control over any part of the assets of the corporation prior to its liquidation.

The stockholders or members of a corporation are not generally liable for its debts. In all jurisdictions, however, stockholders or members can be compelled to pay the amount which they have agreed to pay for stock of the corporation or for membership in it. The laws of some of the States, notably New York and New Jersey, permit the organization of cooperative associations with liability by the stockholders or members for debts of the corporation. In every case the statutes of the State should be examined to determine the exact liability of stockholders or members in that State. Frequently it is assumed that an organization is not a corporation if its members or stockholders are liable for its debts. However, if the organization is incorporated it is a corporation, regardless of this fact. The Supreme Court of the United States has held that an organization may be a corporation, although its stockholders are liable for its debts.[6] But, as a general rule, the stockholders of a corporation are not liable for its debts. From this fact results one of the great advantages of incorporation. It enables a man to venture a definite sum of money in a business without risk of losing more in case the business fails.

Every corporation suggests cooperative effort on the part of those interested. Several of the large industrial corporations have each more than 100,000 stockholders. The cooperation in such organizations consists largely in the pooling of the money paid by stockholders for stock. If each of the original stockholders of one of these corporations had acted singly and independently in attempting to establish and increase the particular business involved, much less progress would probably have been made than has been accomplished through the corporation.

ANTIQUITY OF CORPORATIONS.

The idea of a corporation, which is said to have been originated by the Romans, although there is not entire agreement among law

[3] City of Winfield *v.* Wichita Natural Gas. Co., 267 Fed. 47.

[4] Button *v.* Hoffman, 61 Wis. 20, 20 N. W. 667; City of Winfield *v.* Wichita Natural Gas Co., 267 Fed. 47.

[5] United States *v.* Strang, 254 U. S. 491.

[6] Liverpool Ins. Co. *v.* Mass., 10 Wall. 566.

writers on this point, is an old one. Corporations were known to the Greeks and Romans centuries before the Christian era. Before the Norman conquest (1066) there existed in England organizations having many of the elements of corporations. Churches were among the first of these organizations. It was not until the middle of the seventeenth century that the large trading corporations of England came into existence. Chief among these was the Hudson Bay Co., which continued, it is said, until 1867.

POWER TO CREATE CORPORATIONS.

The power of creating corporations resides in the sovereign. In England they were originally created by the king; later they were created by acts of Parliament with the express or implied assent of the king.[7]

In this country the power to create corporations belongs to each State and the Federal Government. A State legislature may create a corporation or provide for its creation for any proper purpose and may confer upon it such powers as it sees fit, subject only to such restrictions as are found in the State and Federal Constitutions.[8] Congress may create corporations whenever they are necessary or proper agencies for carrying into execution any of the powers conferred by the Constitution upon the Government of the United States.[9] Congress, because it has exclusive jurisdiction over the District of Columbia, has the same power to create corporations within the District that a State has to create corporations within its borders.[10]

Formerly all corporations in this country were created by special acts; that is, a special act was passed by the legislature of the State every time a corporation was created. It was believed that this practice led to favoritism and unjust discrimination,[11] and gradually it has come to pass that practically all of the States have adopted constitutional provisions prohibiting, with certain exceptions in some States, the creation of corporations by special acts.

Every State now has general statutes which authorize and provide for the formation of corporations. The statutes of some of the States are broad and comprehensive and permit the incorporation under them of corporations to engage in practically every form of lawful activity. Sometimes the statutes permit only the incorporation of particular types of corporations, or of corporations to engage in certain lines of business. Even though a business is law-

[7] Blackstone's Commentaries, Book 1–472.

[8] New Orleans Gas. Co. *v.* La. Light Co., 115 U. S. 650; Northern Securities Co. *v.* United States, 193 U. S. 197.

[9] McCulloch *v.* Maryland, 4 Wheat. 316.

[10] Georgetown *v.* Alexandria Canal Co., 12 Pet. 91.

[11] Wells Fargo & Co. *v.* Northern Pacific Ry. Co., 23 Fed. 469.

ful, if provision is not made in the statute for the formation of corporations to engage in that business, they can not be formed in that State.

Those desiring to form a corporation must meet the terms and conditions prescribed by the State. The power of the State in this matter is supreme.[12] The legislature can grant just as little or just as much power to corporations within constitutional limits as it desires. The State can determine upon what conditions corporations may be created and do business within its borders. A cooperative association was incorporated under a statute which among other things provided that all business of associations incorporated under it, except certain enumerated types, should be for cash, and that all persons who extended credit to such associations except for specified purposes should forfeit the amount of the credit thus extended. The statute required that notice to this effect be published on the letter and bill heads, advertisements, and other publications of associations incorporated thereunder. Debts for purposes not contemplated by the statute were incurred by the association, and the creditors sought to throw the association into bankruptcy, but failed, as the court held that they had no claims which could be recognized in bankruptcy, owing to the provision in the statute referred to.[13] In a California case, the validity of a statute providing for the forfeiture of the charters of all corporations which failed to pay a certain tax by a specified date was upheld.[14]

At one time the various States did not have statutes which were adapted to the formation of cooperative associations. There have been, however, many statutes passed by the legislatures of the different States during the last few years for the purpose of providing for the formation of cooperative associations, and at the present time the great majority of the States have statutes especially designed to authorize the creation of such bodies.[15] Although corporations are now, as a rule, formed under general statutes, the act involved in bringing them in existence is regarded as a legislative one, and the rules relative to statutes should be applied in construing charters.[16]

INCORPORATED ASSOCIATIONS—HOW FORMED.

In organizing an incorporated cooperative association, or any other corporation, it is necessary to ascertain and follow the re-

[12] City Properties Co. *v.* Jordan, 163 Calif. 587, 126 Pac. 351.

[13] In re Wyoming Valley Water Coop. Ass'n., 198 Fed. 436.

[14] Kaiser Land & Fruit Co. *v.* Curry, 155 Calif. 638, 103 Pac. 341.

[15] Copies of the statutes of a particular State on this subject can usually be obtained by writing to the Secretary of State of that State.

[16] Casper *v.* Kalt Zimmers Mfg. Co., 159 Wis. 517, 149 N. W. 754; Lord *v.* Equitable Life A. S., 194 N. Y. 212, 87 N. E. 443, 22 L. R. A. (N. S.) 420.

quirements of the statute under which it is proposed to incorporate. Such statutes generally require that a certain number of individuals, usually three or more, must unite in articles of association. The term, articles of association, describes the paper or instrument in which those desirous of forming a corporation set forth the various facts required by the law under which they propose to incorporate. Those whose names appear in the articles of association, or, as they are sometimes called, articles of incorporation, are known as the incorporators. The statutes require that the objects and purposes for which the corporation or association is formed shall be clearly stated in the articles of association or incorporation. They usually require that the name by which the cooperative association or corporation is to be known shall be given and that the amount of capital stock, if the association is to have capital stock, shall be stated. Some of the other usual statutory requirements are the length of time the association is to exist and the place where is principal business is to be transacted.

Application to be incorporated or for a charter is usually made to an officer of the State, generally the secretary of state. The articles of association or incorporation which constitute such application are submitted to this officer and, if he finds that the statute under which the incorporators are seeking to incorporate has been complied with and that the purpose of the association is one provided for in the statute, he issues a certificate of incorporation.

The amount of discretion which the secretary of state or like officer has with respect to the acceptance or rejection of an application for a charter is not the same in all the States.[17] Upon the issuance of the certificate of incorporation, the corporation in most States comes into existence. The procedure in the different States is not uniform, but the above gives a general idea of the steps involved. In Georgia and some other States, application for a charter must be made to a court. In some States the charter or the articles of association, or both, must be recorded in the county where the association is to have its principal place of business. In certain States it is necessary to advertise for a given length of time that an application for a charter is being made. The exact moment when a corporation comes into existence varies in the different States and depends upon their statutes. It is believed that all States require the payment of certain fees as an incident to incorporation.

It is highly important that due consideration should be given by those interested in forming a cooperative association, prior to its incorporation, to the matter of determining the particular statute under which to incorporate. The Capper-Volstead Act, which is discussed elsewhere, should be considered Those interested in form-

[17] Lloyd *v.* Ramsay, (Iowa) 183 N. W. 333.

ing associations of producers to act as live-stock commission agencies should have certain portions of the packer and stockyards act, 1921,[18] in mind, and particularly section 306 thereof, which prohibits the payment of patronage dividends to nonmembers.

Other important matters to be considered at the time of forming an association are the particular provisions to be included in the articles of association, the matter of finances, and of income taxes. To avoid the necessity of amending the charter at a later date, steps should be taken at the time of forming the corporation to see to it that the powers acquired by the association on incorporation are sufficiently broad to permit it to engage in any activity which it may be found advisable to conduct. In the case of associations formed with capital stock those interested should investigate the "blue sky" laws of the State or States in which stock will be sold and govern their actions accordingly.[19] The foregoing as well as other matter appearing herein makes it plain that those desirous of forming an association should have competent advice with respect to the legal aspects of incorporation as well as the conduct of the association's business.

NAME OF ASSOCIATION.

It is absolutely essential that a corporation have a name under which it shall transact its business. Fundamentally the incorporators of a corporation may select any name they choose for the corporation. Statutory provisions now exist in many States in reference to this subject. These provisions frequently require that the name shall clearly indicate that the corporation is incorporated. Sometimes the statutes require that the name shall include the word "corporation," "incorporated," or the abbreviation, "Inc." Restrictions prohibiting the adoption of a name already used or so similar thereto as to be easily mistaken therefor exist in many jurisdictions. The statutes of a number of States prohibit the use of the word "cooperative" in the name of a corporation unless the corporation is a cooperative one or unless it is organized under certain statutory provisions and does business in accordance with them. The term "association" standing alone at common law, and in the absence of a statute, does not have a definite legal meaning. It is true it suggests an organization, but whether the organization is incorporated or unincorporated is unknown. Probably to many it suggests a corporation, and many of the statutes providing for the incorporation of a cooperative association state that the term means a corporation. But in the absence of a statute making it so, the term is not synonymous with corporation. The words "ex-

[18] 42 Stat. 159.

[19] Cannon *v.* Farmers' Union Grain Agency, (Oregon) 202 Pac. 725; Kirk *v.* Farmers' Union Grain Agency, (Oregon) 202 Pac. 731,

change," "union," and "company" likewise do not have an exact legal meaning, but to many they undoubtedly mean the same as the word corporation, and in a number of the States statutes for the incorporation of cooperative associations provide that they are synonymous with the word corporation.

CHARTER—WHAT IT IS.

In the days when corporations were formed through applying to the king, the paper or instrument which was issued by him, if he acted favorably on the application, was called the charter. It was evidence that a corporation had been formed, and it also stated its objects, powers, and limitations. Again, when corporations were created by special acts of the legislature, the act setting forth similar facts was called the charter. At this time, when corporations are created under general statutes, the certificate of incorporation or a similar paper which, as has been previously stated, is issued by the official of the State to whom application is made to be incorporated, is generally looked upon as the charter.

The charter, however, is really much more than the certificate of incorporation. It "consists of the provisions of the existing State constitution, the particular statute under which it is formed, and all other laws which are made applicable to corporations formed thereunder, and of the articles of association or incorporation filed thereunder and the charter or certificate of incorporation granted by the court or officer in compliance with its terms, and its powers, rights, duties, and liabilities are determined accordingly."[20] The foregoing definition makes it clear that the rights, powers, and liabilities of a corporation can not be determined simply by reference to the articles of association and that the charter is something more than a paper.

BY-LAWS.

The making of by-laws is a matter which is usually taken up after the creation of a corporation. The power of a corporation to make by-laws exists at common law. Frequently, however, it is given by the charter or statutes. The statutes of some of the States require that cooperative associations shall adopt by-laws within a certain length of time after their formation. In the absence of a statute requiring it it is not necessary although highly desirable for a corporation to adopt by-laws. The power to adopt by-laws resides in the stockholders or members, and they alone have the power to adopt them in the absence of a provision in the general law or in the charter, placing it in the hands of a select body. They can, however, delegate this right to the directors.

[20] 14 C. J. 117.

The purpose of by-laws is to provide rules for the regulation of the affairs of the corporation. They can make provision consistent with law and with the charter for any matter or thing relative to the conduct or business of the corporation. By-laws should perform the same office for a corporation or association that a blue print performs for a builder. They should constitute a working plan for the corporation. Among the matters usually provided for in the by-laws of a corporation are the following: The time, place, and manner of calling and conducting its meetings and the giving of notice thereof, the number of members constituting a quorum, the qualifications and duties of directors and officers and their compensation, if any, and suitable penalties for violation of the by-laws.

By-laws are to be distinguished from rules adopted for the guidance of the public dealing with the corporation. The members of a corporation and its directors and officers are generally conclusively presumed to have notice of by-laws, and of what they contain, and hence are bound by them, although, as a fact, they may be ignorant of them.[21]

The great importance of members, officers, and directors knowing the provisions of the by-laws of their association is thus apparent. On the other hand, strangers having no knowledge of the by-laws are not bound by them. If notice of the by-laws, either express or implied, reaches strangers it is usually held to be binding on them.[22]

A question which will readily occur to anyone is whether the majority of the members of an association may adopt by-laws which will be binding upon the minority who oppose their adoption.[23] The answer is that they may, if such by-laws are reasonable and consistent with the charter and the general law. However, the majority can not adopt and enforce by-laws which violate the law or run counter to the purpose for which the association was formed. In an Arkansas case, a majority of the members of a corporation sought through a by-law to make what, under the circumstances, was held to be an attempted gift of a sum of money to one of their members. Certain stockholders of the corporation opposed the by-law and later resorted to the courts to prevent the turning over of the money. It was held that the action contemplated was a distinct violation of their rights and was, therefore, illegal.[24] A by-law must be general in its application and not aim at a particular member.[25] As indicating the possible scope of by-laws, a Nebraska case

[21] Brent *v.* Washington Bank, 10 Pet. 594; Columbia Bldg., etc. Ass'ns *v.* Junguist, 111 Fel. 645; Washington Cooperative E. & P. A. *v.* Taylor (Wash.), 210 Pac. 806.
[22] Rathbun *v.* Snow, 123 N. Y. 343, 25 N. E. 379, 10 L. R. A. 355.
[23] Iowa State & Savings Bank *v.* C. Nat. Bank, (Neb.) 83 N. W. 982.
[24] G. W. Jones Lumber Co. *v.* Wisarkana Lumber Co., 125 Ark. 65, 187 S. W. 1068.
[25] Budd *v.* Multnomah St. R. Co., 15 Oreg. 413, 15 Pac. 659.

is interesting. It was held that a corporation not organized for profit and whose capital stock was fully paid up could lawfully require annual dues from its members.[26] An invalid by-law, if not opposed to public policy, is generally enforced as a contract between the members and between the corporation and its members. For instance, if the members of an association adopt what purports to be a by-law, but which is void for the reason that the corporation or association is not empowered by the law of the State in which it is incorporated or by its charter to adopt the particular by-law, it will, as a general rule, be enforced as a contract.[27] The term "constitution" is frequently used in connection with by-laws. So far as an incorporated association is concerned, it is not believed that the expression has any place. A "constitution" has been held to be only a by-law with an inappropriate name and in no sense a charter.[28]

DIRECTORS AND OFFICERS.

After an incorporated cooperative association or other corporation has been created, it is then necessary to elect directors and officers through whom the association may conduct its business. In some States the directors and officers for the first year or for the purpose of initiating the work of the corporation are chosen before incorporation, but this is not usually required or done. The directors are elected by the members of the association for a given length of time[a] which is sometimes specified in the law of the State. The directors, in turn, as a rule, elect the officers, who are usually chosen from among their number. Unless a statute requires, it is not necessary that the directors should be stockholders or members of the association.

The directors and officers of a cooperative association or other corporation are required to act honestly and fairly in conducting the affairs of the corporation. A director or officer must be open and aboveboard in his transactions with the corporation. He must not take advantage of his position to drive an unjust bargain with the corporation or its stockholders. It is his duty to use his best efforts to promote the interests of the stockholders or members of the corporation, and he can not acquire any adverse interests. The injunction that "No man can serve two masters" is recognized by the courts, and contracts entered into by directors or officers with the corporation are scrutinized by the courts with this thought in mind. In a Wisconsin case[29] a corporation employed a man as man-

[26] Omaha Law Library Ass'n. *v.* Cornell, 55 Neb. 396, 75 N. W. 837.

[27] Strong *v.* Minnesota Automobile Trade Ass'n., (Minn.) 186 N. W. 800; New England Trust Co. *v.* Abbott, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271.

[28] Supreme Lodge K. P. *v.* Kutscher, 179 Ill. 340; 53 N. E. 620.

[a] Weil *v.* Defenbach (Idaho), 208 Pac. 1025.

[29] Timme *v.* Kopmeir, 162 Wis. 571, 156 N. W. 961, L. R. A. 1919, 1114; see also West *v.* Camden, 135 U. S. 507.

ager and at the same time sold him 100 shares of stock. A director of the corporation entered into a contract with the manager under which the manager agreed, in case he left the employment of the corporation for any cause, to sell his stock to the director. The contract was held void on the ground that the private interests of the director were antagonistic to those he owed the corporation. The court said:

> The defendant as director had a voice in determining whether or not plaintiff was to continue in the management of the corporate business, whether or not plaintiff's management was for the general interest of the corporation and its stockholders. Obviously his duties as director and his private interest, under the contract to repurchase plaintiff's stock upon the conditions stated were antagonistic and his private interests might oblige him to act contrary to his duties toward the other stockholders. Under such circumstances, such contracts are held void on the ground of public policy, unless all of the stockholders assent thereto.

In the absence of a provision in the statute, charter, or by-laws, a majority of the directors constitute a quorum and when regularly assembled may transact any business which the corporation has a right to transact under its charter.[30]

All of the directors constituting a quorum must be qualified to act. If one of the directors whose presence is necessary to constitute a quorum is disqualified because of his personal interest in the matter that is being considered, the action would not be binding on the corporation or stockholders if a timely effort to set it aside were made. For instance, if a director should offer to sell land to the corporation and as one of a quorum of the directors should vote in favor of its purchase, the transaction would not be binding on the corporation or the stockholders if they seasonably moved to set it aside.[31]

The officers and directors of a corporation are bound by the restrictions imposed upon the corporation by its charter and by-laws, and if they transgress such restrictions are liable for all damages resulting to the corporation therefrom. In a Minnesota case[32] the articles of incorporation limited the indebtedness which the corporation might incur to half the amount of the capital stock actually paid in. The manager, who was also a large stockholder, contracted debts in excess of this amount. It was claimed that the corporation suffered a loss by reason of the excess indebtedness, and it brought suit against the manager to recover the amount of the loss which it claimed it had sustained and recovered a judgment for $3,000 against him.

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[30] In re Webster Loose Leaf Filing Co., 240 Fed. 779.

[31] In re Webster Loose Leaf Filing Co., 240 Fed. 779; Wardell *v.* Railroad Company, 103 U. S. 651.

[32] Fergus Falls Woolen Mills Co. *v.* Boyum, 136 Minn. 411, 162 N. W. 516.

In probably all of the States there are penal statutes prescribing punishments for various acts by officers and agents of the corporation. Typical among such offenses are securing subscriptions to stock by fictitious persons or deceiving State officials by false entries or records as to the assets of the corporation. In some States directors of corporations are personally liable to creditors of the corporation in the event that they create debts beyond the prescribed capital stock.

An officer or director of a corporation at common law may resign at will,[33] and a statute providing that directors shall hold office for one year and until their successors have been elected and qualified does not prevent resignation during the year.[34]

WHO MAY BECOME MEMBERS.

The question of who may become stockholders or members of a corporation is worthy of consideration. Fundamentally a corporation has the right to determine to whom it will sell stock or issue membership certificates. On the other hand, a corporation can not make an individual a member or stockholder of it without his consent. Within constitutional limits a State undoubtedly could by statute require corporations incorporated under it to admit to membership all who apply and meet certain conditions or who belong to a certain class, but as a rule this is not done.

SUBSCRIBER, STOCK, CAPITAL STOCK.

"A subscriber is one who has agreed to take stock from the corporation on the original issue of such stock." [35] The shares of stock into which the capital stock of the corporation is divided may consist of common stock or common and preferred stock. In Cook on Corporations it is said:

> By common stock is meant that stock which entitles the owners of it to an equal pro rata division of profits, if any there be; one stockholder or class of stockholders having no advantage, priority, or preference over any other shareholder or class of stockholders in the division. By preferred stock is meant stock which entitles its owners to dividends out of the net profits before or in preference to the holders of the common stock. Common stock entitles the owner to pro rata dividends equally with all other holders of the stock except preferred stockholders, while preferred stock entitles the owner to a priority in dividends.

Usually the dividend rate on preferred stock is fixed, while that on common stock in commercial corporations is not generally fixed.

Under the statutes of many of the States the right to vote at meetings of the stockholders is limited to the common stockholders, and

[33] Ewald *v.* Medical Society, 130 N. Y. S. 1024; (reversed on other grounds, 144 App. Div. 82).

[34] Briggs *v.* Spaulding, 141 U. S. 132, 154.

[35] Cook on Corporations, vol. 1, p. 43.

many of the statutes providing for the incorporation of cooperative associations authorize by-laws limiting the right to vote to common stockholders of the corporation.

The capital stock is usually divided into equal portions called shares; and a share of the capital stock of a corporation is the interest or right which the owner has in the management of the corporation, in its surplus profits, and upon dissolution in all its assets remaining after the payment of its debts.[36]

Shares of stock are usually represented by certificates of stock. A certificate of stock is not the stock itself but simply evidence of its ownership, just as a deed is evidence of the ownership of land. A stockholder or shareholder is one who owns one or more shares of stock. One may be a stockholder, although no certificate of stock has been issued to him,[37] just as one may be the owner of other personal property, although he has never received a bill of sale thereto.

STOCK—HOW PAID FOR.

Stock, as a rule, may be paid for with cash, labor, or other property. There are in most States statutory provisions relative to paying for stock otherwise than with cash, and these should be ascertained and carefully followed. Stock may, in the absence of charter or statutory provisions, be issued in payment for property. The property, however, should be reasonably worth the par value of the stock paid for it. It is the general rule that in order for a payment for stock to be good as against the corporation or creditors thereof, it must be paid for in money or what may fairly be considered as money's worth.[38]

VOTING UNIT.

At common law a stockholder or member of a corporation has but one vote on questions coming before meetings of stockholders, irrespective of the number of shares held by him.[39] Statutes or charters in the case of business corporations generally, prescribe that each share of stock shall be entitled to one vote. Unless each share of stock is given a vote by statute, those interested in forming an association may, if the incorporation statute authorizes, include a suitable provision in the articles of associations establishing what the voting unit at meetings of the stockholders shall be. It would also appear to be the right of members of a corporation to adopt a by-law on the subject where the matter is not controlled by statute or by the charter.[40] However, it has been held in the absence of a

[36] 14 C. J. 384.
[37] In re Culvers estate, 145 Iowa 1, 123 N. W. 743.
[38] In re Manufactures Box & Lumber Co., 251 Fed. 957.
[39] Taylor *v.* Griswold, 14 N. J. Law 222, 27 Amer. Dec. 33; Simon Borg & Co. *v.* New Orleans City Ry. Co., 244 Fed. 617, 619; Matter of Rochester Dist. Tel. Co. (N. Y.), 40 Hun. 172; 7 R. C. L. 239.
[40] Detwiler *v.* Commonwealth ex rel. Dickinson, 131 Pa. 614, 7 L. R. A. 357.

provision in the statute or charter on the subject, that a by-law changing the common-law rule is void.[41] If there is a statute or charter provision dealing with the matter it controls, and a by-law to be valid must be in harmony therewith. In a case decided by the Supreme Court of the United States it was said:

> Usually a stockholder is a member of the company, and as such has a right to vote, but it does not necessarily follow that the right increases with the increase in stock, or that the right is lessened in case the number of shares owned by the stockholder should be diminished.[42]

In case there is no provision in the statute, charter, or by-laws on the subject, the common-law rule prevails of one vote for each member or stockholder without regard to the number of shares he may own. With respect to nonstock associations or corporations, this rule also prevails unless changed in one of the ways indicated. It is interesting to note that the generally accepted cooperative principle of one man, one vote, is merely an application of the common-law rule on the subject.

RESTRICTING TRANSFER OF STOCK.

May an incorporated cooperative association or any other corporation restrict the transfer of its stock as against third persons? The answer is yes, if appropriate statutory authority exists in the State in which the association is incorporated. If a statute of the State expressly restricts the transfer of stock except under certain conditions, the matter is clear. This was the situation in a Minnesota case [43] where the statute under which the association was incorporated provided that "No person shall be allowed to become a stockholder in such association except by the consent of the managers of the same." The court said, "We have no doubt of the validity of such a restriction on the transfer of shares." If the statute of the State under which the association is incorporated authorizes the inclusion of a provision in the articles of association or the certificate of incorporation or the by-laws restricting the transfer of stock, there would seem to be no doubt concerning the right of an association to adopt such a restriction.

From the cases that have come before the courts it is apparent that the required statutory authority need not expressly authorize restrictions on the transfer of stock, but general language dealing with this subject would seem to be enough. A few illustrations from decided cases will shed light on this matter. In a recent New York case (1919) the certificates of incorporation of each of the three corporations involved, "Provided that no stock shall be transferred until it was first offered for sale to the other stockholders on terms

[41] Taylor *v.* Griswold, 14 N. J. Law 239, 27 Amer. Dec. 33.
[42] Bailey *v.* Railroad Co., 89 U. S. 604, 635.
[43] Healey et al. *v.* Steele Center Creamery Ass'n, 115 Minn. 451, 133 N. W. 69.

and conditions to be fixed by the by-laws or by agreement between stockholders, but, in case the offer to sell were refused, the stock would be no longer subject to the conditions." The court held this provision and the by-laws and the agreement connected therewith valid and enforceable. Notice of the restrictions on the sale of stock were stamped on each certificate of stock.[44] Section 10 of the General Corporation Law of New York provides that "The certificate of incorporation of any corporation may contain any provisions for the regulation of the business and the conduct of the affairs of the corporation, and any limitation upon its powers, or upon the powers of its directors and stockholders, which does not exempt them from the performance of any obligation or the performance of any duty imposed by law." It was apparently in pursuance of this provision that the restrictions on the right to transfer the stock were included in the certificates of incorporation. In every case undoubtedly there must be some provision in the statute or general law of the State under which an association is formed to authorize the inclusion in the articles of association or the certificates of incorporation of a provision such as that involved in the New York case. A case presenting similar facts in which a like conculsion was reached was passed upon by the Supreme Court of Massachusetts.[45] If there is nothing in the law of the State authorizing the inclusion of a provision in the articles of association or the certificate of incorporation restricting the transfer of stock, the fact that one was included would undoubtedly be held to be valueless.

A statute may authorize associations incorporated under it to adopt by-laws restrictive of the right to transfer stock. This was the situation in a North Dakota case.[46] The statute empowered associations incorporated under it, "To regulate and limit the right of stockholders to transfer their stock" and to make by-laws for the management of its affairs and, "To provide therein the terms and limitations of stock ownership." It was held that a by-law which provided that, "No stockholder shall transfer his stock without first giving the corporation 90 days' notice and option to purchase said stock at par plus the accrued and undivided dividends which are payable per share" was valid. The by-law was referred to on the face of the certificates of stock.

A similar conclusion was reached in an Ohio case involving an analogous statutory provision.[47] Where the statute under which an association is incorporated authorizes the inclusion in the articles of association or the certificate of incorporation or in the by-laws of

[44] Bloomingdale *v.* Bloomingdale, 177 N. Y. S. 873.

[45] Longyear *v.* Hardman, 219 Mass. 405, 106 N. E. 1012; see also Kasper *v.* Kalt Zimmers Mfg. Co., 159 Wis. 517, 149 N. W. 754.

[46] Chaffee *v.* Farmers' Co-op. El. Co., (N. D.) 168 N. W. 616.

[47] Nicholson *v.* Franklin Brewing Co., 82 Ohio 94, 91 N. E. 991, 19 Am. Cas. 699.

a provision restricting the transfer of its stock, such a provision will be enforced by the courts of the State where suit is brought, although the association was incorporated in another State. These were the facts in the case last mentioned. In that case the corporation was incorporated in Delaware, but the transactions relative to the stock took place in Ohio, where the corporation had its principal place of business, and the suit was brought there. One is charged with notice of the law of the State under which a corporation is incorporated and of its powers. Even though a by-law restricting the right to transfer stock is unauthorized by the statute under which the corporation is formed, they have been enforced as contracts between the corporation and its members,[48] although a contrary conclusion has been reached.[49] It is not believed that an absolute prohibition on the transfer of stock in an unauthorized by-law would be upheld. Shares of stock at common law are regarded as personal property, and as such all the rules of law relative to such property are applicable. The policy of the law is against prohibitions or such as have that effect on the transfer of property, on the theory that the right of sale or disposition is an inseparable incident of its ownership. But the law permits some restrictions on the right of sale or transfer of real or personal property.[50] In a case decided by the Supreme Court of the United States it was said that "In * * * a joint stock corporation * * * each stockholder whether by purchase or original subscription has the right, unless restricted by the charter or articles of association, to sell and transfer his shares and by transferring them introduce others in their stead."[51]

LIEN ON STOCK.

If a statute under which a corporation is incorporated or the general law of the State gives a corporation a lien on the stock of a stockholder for debts due the corporation by him, strangers, even though without actual notice, and residents of other States buy the stock subject to the lien. The Supreme Court of the United States has said:[52] "Where by general law a lien is given to a corporation upon its stock for the indebtedness of the stockholder, it is valid and enforceable against all the world." If the statute under which an association or corporation is to be incorporated authorizes the inclusion of a provision in the articles of association or the certificate of incorporation giving the corporation a lien on its stock for

[48] New England Trust Co. *v.* Abbott, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; Clothing House *v.* Dickinson (Minn.), 178 N. W. 957.

[49] Steele *v.* Farmers & Merchants' Mutual Tel. Assn., 95 Kan. 580, 148 Pac. 661.

[50] Lathrop *v.* Merrill, 207 Mass. 6, 92 N. E. 1019; Gray Restraints on the Alienation of Property (2d ed.), p. 399.

[51] Morgan *v.* Struthers, 131 U. S. 246, 254.

[52] Hammond *v.* Hastings, 134 U. S. 401.

any indebtedness due it by a stockholder, such a provision, if included, is also valid against all the world.[53] In a New York case the articles of association provided that, "No shareholder of the association shall be permitted to transfer his shares or receive a dividend or interest thereon who shall owe to the association a debt which shall have become due, until such debt be paid, unless by and with the consent of the board of directors of the association." On the face of each certificate of stock involved was the statement, "Subject to the conditions and stipulations contained in the articles of association." Although the plaintiff had no actual knowledge of the limitation on the transfer of stock, he was held bound by the provision in the articles of association.[54]

LIMITATION ON INDEBTEDNESS.

The common law places no limit upon the amount which a corporation may borrow. The amount borrowed may be greater than the capital stock.[55] The general rule is that a debt contracted by a corporation in excess of the limit fixed by statute or by the charter is valid and enforceable against the corporation. A national bank purchased furniture and executed three promissory notes in payment thereof at a time when the amount of its indebtedness exceeded that allowed by a Federal statute. In a suit brought on the notes it was held that the notes were enforceable against the bank. In this case it was said, "We hold, therefore, that an indebtedness which a national bank incurs in the exercise of any of its authorized powers is not void from the fact that the amount of the debt surpasses the limit prescribed by the statute or is even incurred in violation of the positive prohibition of the law in that regard."[56] In an Iowa case[57] it was said, "A corporation debt contracted in excess of the maximum limitation in its articles of incorporation is not void because of such excess." In the case of a corporation there are no public records by which one about to extend credit to it can ascertain the amount of indebtedness already incurred at the time credit is extended, and this furnishes a sufficient reason for holding a corporation liable in cases like those just discussed.

As pointed out elsewhere, officers and directors are liable to the corporation for all damages suffered by it where they exceed the limit of indebtedness fixed by the statute, charter, or by-laws. And directors and officers are made personally liable by statute in some States to third persons for debts in excess of the statutory amount.

[53] Union Bank *v.* Laird, 2 Wheat. 390.
[54] Gibbs *v.* Long Island Bank, 83 Hun. 92, 31 N. Y. S. 406.
[55] Cook on Corporations, Sec. 760.
[56] Weber *v.* Spokane Nat. Bank, 64 Fed. 208; see also H. Scherer & Co. *v.* Everest, 168 Fed. 822; Grand Valley Water Users' Association *v.* Zunbrunn, 272 Fed. 943.
[57] Juskin *v.* Plain Dealer Pub. Co., (Iowa) 165 N. W. 339.

LIABILITY OF CORPORATION FOR PROMOTION EXPENSES.

What is the liability of a corporation on contracts made or obligations incurred by its promoters or those who are active in forming and organizing it? The answer is that as a general rule it is not liable unless it recognizes and ratifies the contracts or obligations after its formation. This question arises in connection with the work done or contracts made incident to the promotion of a corporation and prior thereto by those who are active in bringing about the existence of the corporation.

In a North Dakota case,[58] in which the claim involved arose out of work done by a stock subscription solicitor in obtaining subscribers to the capital stock of a corporation to be organized, it was said:

> It is elementary that a corporation is not liable upon contracts entered into by its promoters. Before the corporation comes into existence, it can have no representative and no one is capable of acting for it. Those interested in promoting it may nevertheless contemplate the ultimate payment by corporation of the legitimate promotion expenses. But the corporation does not become liable for such expenses in the absence of a subsequent undertaking in some form.

In a Montana case[59] appears the following:

> In the absence of a statute, a corporation will be held liable for services rendered by its promoters before incorporation, only when by express action taken after it becomes a legal entity it recognizes or affirms such claim, a failure to object when the claim is mentioned is not such an assumption or adoption as will bind the corporation.

It is true that as a rule a corporation usually pays the necessary legitimate expenses and costs incurred by those who brought about its formation, but the corporation is not liable for such charges unless it elects to pay them.

DIFFERENCES BETWEEN STOCK AND NONSTOCK CORPORATIONS.

A stock corporation is a corporation having capital stock divided into shares. As evidence of these shares, although not the shares themselves, certificates of stock are usually issued.

Capital stock and stock certificates or stock are generally regarded as characteristics of a business corporation. That is, business corporations usually have capital stock and usually issue certificates of stock. This need not necessarily be true. For it should be remembered that corporations are creations of the legislature and that it can, within constitutional limitations, endow them with such powers and limitations as seem advisable. The State, then, can create business corporations without the elements mentioned. True,

[58] Davis *v.* Joerke, (N. Dak.) 181 N. W. 68.

[59] Kirkup *v.* Anaconda Amusement Co., (Mont.) 197 Pac. 1005; see also Cushion Heel Co. *v.* Hartt, 181 Ind. 167, 103 N. E. 1013, 50 L. R. A. (N. S.) 979.

this is not generally done, but the power to do so undoubtedly exists. The thought to have in mind is that the legislature has complete control, within constitutional limitations, of the creation of corporations. It may make no provision for their creation, or it may grant those created limited or wide powers.

Nonstock corporations do not have capital stock and usually are not commercial organizations. They generally issue certificates of membership to their members evidencing the right of the members in the corporation. Some of the more common of the corporations of this type are incorporated churches, clubs, or social organizations. In the early history of business corporations having capital stock, certificates of stock evidencing the shares into which the capital stock of the corporation had been divided were not issued, but as time went on some corporations issued certificates of stock evidencing the interest of shareholders in the corporation. The convenience and desirability of stock certificates which could be readily transferred from hand to hand were so apparent that it soon came to be looked upon as a right of a member of a business corporation to have certificates of stock issued to him. And at this time purchasers of stock may generally require the corporation to issue certificates of stock.

From an early date stock certificates were assigned and transferred, and this assignability is generally regarded as one of their leading qualities. Stock of a corporation is regarded as property and, like property of any other kind, is vendible. The whole policy of the law is against restraint on the disposition or sale of property. However, the courts have, where the corporation was authorized to do so, as previously explained, upheld restrictions on the right of members to transfer shares of stock. At common law, however, shares of stock are regarded as personal property capable of sale, transfer, or succession in any of the ways by which personal property may be transferred.[60]

On the other hand, the interest which a member has in a nonstock corporation, which is usually evidenced by a certificate of membership, at common law is not transferable. In a certain case the plaintiff acquired a certificate of membership from one who was formerly a member of a nonstock corporation, but it was held that this did not constitute the plaintiff a member of the corporation.[61] Of course certificates of membership could be made transferable by statute, by charter, or by authorized by-laws, but in the absence of specific provisions on the subject they are not transferable. Funda-

[60] Cook on Corporations, sec. 331; Mobile Mut. Ins. Co. *v.* Cullom, 49 Ala. 558; Boston Music Hall *v.* Corp., 129 Mass. 435.

[61] American Live Stock Comm. Co. *v.* Chicago Live Stock Exchange, 143 Ill. 210, 18 L. R. A. 190.

mentally, therefore, certificates of membership are not transferable, while shares of stock fundamentally are transferable.

Churches were among the first organizations to be incorporated. It is obvious that church membership, from its peculiar personal quality, is essentially nontransferable. This personal element, which is so apparent in the case of church organizations and in social clubs and kindred organizations, may have been responsible for the establishment of the concept, both in the decisions of the courts and in the minds of the people, that membership in a nonstock corporation is not assignable. This principle is basic and in the absence of special provision on the subject is applicable. In view of the foregoing, it is apparent that fundamentally a nonstock association can control its membership better than a stock association.

At common law the stock of a member of a corporation could not be forfeited and the member expelled from the corporation, while nonstock corporations possess the inherent right to expel members for cause.[62] From an early date it was recognized as one of the inherent powers of a nonstock corporation to expel members for cause. Without any charter or statutory provisions on the subject a nonstock corporation may for cause expel members. This, as previously stated, is not true with respect to a stock corporation. Where the charter of a nonstock corporation is silent on the power of expulsion and there are no statutory provisions on the subject, the decided weight of authority is that a member may be expelled for only three reasons: (1) Offenses of an infamous nature indictable at common law; (2) offenses against the members' duty to the corporation; (3) offenses compounded of the two.

In the absence of restrictions in the charter or by-laws of a nonstock corporation or of a statutory provision on the subject, a member may withdraw at any time, and no acceptance is required.[63] On the other hand, shareholders or members of a corporation having capital stock can not, strictly speaking, withdraw from the corporation.[64]

This brief sketch on the differences between stock or nonstock corporations explains why a stock corporation is generally thought of as a commercial organization; that is, as an organization in which money, rather than the personnel of the membership, is the dominant factor. By appropriate charter or statutory provisions a stock corporation may exercise control over its membership resembling that exercised by nonstock corporations. Indeed, no reason is apparent why the legislature could not endow stock corporations, at least at the time of their creation, with as complete control over their mem-

[62] Fletcher Cyclopedia Corporation, sec. 3960.

[63] Ewald *v.* Medical Society, 130 N. Y. S. 1024, (reversed on other grounds, 144 App. Div. 82); Finch *v.* Oake, 73 L. T. R. (N. S.) 716.

[64] Picalora *v.* Gulf Cooperative Co., 123 N. Y. S. 980.

bership as that possessed by nonstock corporations. In several jurisdictions at this time statutes providing for the incorporation of cooperative associations with capital stock exist which give such associations control over their members or stockholders comparable with that fundamentally possessed by nonstock corporations.

TRANSFER OF STOCK, LOSS OF MEMBERSHIP.

As has been pointed out elsewhere, an incorporated cooperative association or other corporation may, if appropriate statutory authority exists, restrict the transfer of its stock. At common law, however, shares of stock may be transferred or disposed of in any of the ways known to the law. In the absence of restrictions, therefore, shares of stock may be sold, devised, or transferred like property of any other kind. Transfer books are usually kept by corporations in which the names and addresses of purchasers of stock are kept. This is necessary in order that the officers of the corporation may be able to pay the dividends to those entitled thereto, and in order that notices may be sent to the shareholders. Fundamentally, and this is the rule in the absence of stipulations to the contrary, on the transfer of the stock of a corporation held by an individual the purchaser stands in the place of the former owner as to rights and liabilities, and the former owner has no further interest in the corporation and is free from any further liability.[65]

As previously stated, the general rule is that the owner of stock or the holder of a membership certificate that is fully paid for is exempt from liability to the creditors of the corporation. Limited liability is the general rule relative to the stockholders or members of a corporation. In the case of nonstock corporations one who ceases to be a member of the corporation from any cause in the absence of express provisions to the contrary loses his interest in the corporation and in turn is free from any further liability. At common law one who withdraws, resigns, or is expelled from a nonstock corporation or association is not entitled to any compensation or pay for his interest or equity in the assets of the association. In a Florida case[66] certain members withdrew from a fruit marketing association and then instituted a suit against it. One of the objects of the suit was to obtain compensation for "their interest" in the association. Apparently there was no provision, either statutory or otherwise, on the subject. The court held that the members on withdrawing from the association lost all their rights therein, and that all of the assets of the association could be

[65] Whitney *v.* Butler, 118 U. S. 655.

[66] Clearwater Citrus Growers' Ass'n. *v.* Andrews (Florida), 87 So. 903; see also Union Benev. Soc. No. 8 *v.* Martin, 113 Ky. 25, 67 S. W. 38; Dade. Coal Co. *v* Penitentiary Co., 119 Ga. 824; 19 R. C. L. 1267.

used for the benefit of the remaining members, and that nothing was due the members who had withdrawn.

DISSOLUTION.

It is clear that through unanimous consent on the part of the stockholders or members of a corporation it may be dissolved.[67] The right of a majority of the stockholders or members at common law to force a dissolution of a corporation against the opposition of the minority is not so well established. Some authorities hold that the majority can force a dissolution,[68] while a contrary doctrine has been laid down.[69] Of course, if there are statutory or charter provisions on the subject they would control. A corporation may cease to exist through the expiration of its charter if the duration of the corporation is limited, and its charter may be forfeited by the State for unauthorized or unlawful action or conduct,[70] or the charter may be repealed through the reserved power of the State.[71] On the dissolution of a corporation after the payment of its debts at common law, its assets are distributed pro rata among the various stockholders or members according to the number of shares held by them.[72] In the case of corporations having preferred stock, the preferred stockholders by express provisions are frequently given preference over the common stockholders in the distribution of the assets of a corporation on its dissolution. The rule that the assets belong to the members of a corporation on its dissolution applies to nonstock[73] as well as to stock corporations. If those interested in a corporation continue to do business in its name after the expiration of the charter or after the dissolution of the corporation in any other manner, they incur personal responsibility and liability in the matter.

CONTRACTS.

NATURE AND CHARACTERISTICS.

A contract has been defined as an agreement between competent parties, upon sufficient consideration, to do or not to do a particular lawful thing.[74] In order to be binding and enforceable a contract must possess mutuality; that is, both parties must be bound, or neither will be. For instance, if one party agrees to sell a certain article, the other must agree to buy, or the agreement is void.[75] A contract

[67] Mobile, etc. R. R. *v.* State, 29 Ala. 573, 586.
[68] State *v.* Chilhowee, etc., Mills, 115 Tenn. 266.
[69] Polar Star Lodge *v.* Polar Lodge, 16 La. Ann. 53; see also Stockholders, etc. *v.* Jefferson, etc. Assoc. (Iowa), 136 N W. 672.
[70] Tobacco Growers Co-operative Association v. Jones, (1923) —— North Carolina ——.
[71] Swan, etc. Co. *v.* Frank, 148 U. S. 603, 611.
[72] Krebs. *v.* Carlisle Bank, 14 Fed. cas. 856; Central, etc. *v.* Smith, 43 Colo. 90.
[73] Hopkins *v.* Crossley, 138 Mich. 561.
[74] Blackstone's Comm. Book II. 442.
[75] American Oil Co. *v.* Kirk, 68 Fed. 791.

or agreement by which a member of a cooperative association appoints the association his agent for the sale and marketing of his products, to be valid should also contain a provision in which the association agrees to act as such agent and do the work in question.

A contract should be in writing and signed by both parties. It should clearly and fully set forth the rights, duties, and obligations of each of the parties. Particular care should be taken to make certain that the contract is clear upon every point involved. For when parties to a contract have apparently set forth in writing the understanding between them with reference to the matter involved, it is presumed to represent the entire agreement of the parties thereto, and ordinarily it can not be successfully disputed by oral evidence. Every legitimate matter is a proper subject for contract. The law of contracts underlies the entire field of business and enters into every commercial transaction.

CROP CONTRACTS.

One may enter into a valid contract with another under which he agrees to deliver the crop to be grown upon certain land or a part thereof.[76] The number of cases involving crop contracts of cooperative associations which have come before appellate courts for construction are few. One of the most recent decisions [77] is that involving a cranberry association of the State of Washington. In this case the supreme court of that State said:

> The appellant makes three principal contentions: First, that the contract is void at common law as against public policy; second, that it is contrary to article 12, section 22, of the constitution of this State, which is the section covering the matter of monopolies and trusts, and, third, that the contract is void as being in contravention of the Sherman Antitrust Act, passed by the Federal Congress on April 2, 1890.

The contract was upheld as against the various contentions referred to, and an injunction issued restraining the defendant from disposing of his cranberries outside of the association. The contract involved was one of 60 similar contracts.

An Alabama case,[78] a California one,[79] and two New York decisions [80] also support the validity of such contracts. In Iowa [81] and Colorado [82] the decisions indicate that liquidated damage clause provisions in such contracts are invalid in those States on the

[76] Butt *v.* Ellett, 19 Wall. 544; Briggs *v.* U. S., 143 U. S. 346.

[77] Washington Cranberry Growers Association *v.* Moore (Wash.), 201 Pac. 773, 204 Pac. 811.

[78] Ex Parte Baldwin County Producers Corporation, 203 Ala. 345, 83 So. 69.

[79] Anaheim Citrus Fruit Ass'n. *v.* Yeoman, (Calif.) 197 Pac. 959.

[80] Bullville Milk Producers Ass'n. *v.* Armstrong, 178 N. Y. S. 612; Castorland Milk and Cheese Ass'n. *v.* Shantz, 179 N. Y. S. 131.

[81] Reeves *v.* Decorah Farmers Cooperative Society, 160 Iowa 194, 140 N. W. 844. 44 L. R. A. (N. S.) 1108; Ludewese *v.* Farmers M. C. Co., 164 Iowa 197, 145 N. W. 475.

[82] Burns *v.* Wray Farmers' Grain Co., 65 Colo. 425, 176 Pac. 487.

ground that they operate to restrain trade unlawfully. For a discussion of this proposition the reader is referred to the sections dealing with liquidated damages and antitrust matters.

POOLING: RIGHT TO DETERMINE GRADE.

A provision in a crop contract authorizing a cooperative association to pool the products of the various members with whom it has contracts is undoubtedly valid.[a] It is a proper subject for contract. Of course, the question of whether the pooling was done fairly and in accordance with the contract is a different matter. The association would be liable to a member in case it failed to act in good faith and in accordance with the terms of the contract.

A stipulation in a contract giving a cooperative association or one or more of its officers or agents the right to determine conclusively the grade and quality of produce delivered under it appears to be valid. This doctrine is subject to the qualification that the officers or agents must act honestly and in good faith. In a case decided by the Supreme Court of the United States:[83]

> A contract for the construction of a railroad provided that the company's engineer should in all cases determine questions relating to its execution, kinds of work to be done, and the compensation earned by the contractor at the rates specified; that his estimate should be final and conclusive; and that whenever the contract shall be completely performed on the part of the contractor, and the said engineer shall certify the same in writing under his hand, together with his estimate aforesaid, the said company shall, within thirty days after the receipt of said certificate, pay to the said contractor, in current notes, the sum which according to this contract shall be due.

It was held that in the absence of fraud or such gross mistake as would necessarily imply bad faith or a failure to exercise an honest judgment, the action of the engineer was conclusive and binding upon the parties. In a Massachusetts case [84] it was said:

> It is well settled that where one agrees that another may fix the price for certain property or the sum to be paid for material or services, the decision of the party selected can not be impeached by showing that he has committed an error of judgment or failed to avail himself of all the information which he might have obtained, or has valued the property too high or too low.

These cases announce a principle which would clearly include the right of a cooperative association to determine in good faith the grade and quality or other factors incident to products delivered by a member if authorized to do so by a suitable provision in the contract.

LIQUIDATED DAMAGES.

Liquidated damages are damages the amount of which has been determined in advance by agreement between the parties. Long before the days of Blackstone parties inserted provisions in their

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[a] Tobacco Growers' Cooperative Association *v.* Jones, (1923) —— North Carolina ——; Washington Cooperative E. & P. A. *v.* Taylor, (Wash.) 210 Pac. 806.

[83] Martinsburg & Potomac R. R. Co. *v.* March, 114 U. S. 549.

[84] New England Trust Co. *v.* Abbott, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; see also Berger Mfg. Co. *v.* Huggins, 242 Fed. 853.

contracts that one should pay a certain sum, in case he breached the contract, to the other as satisfaction for the loss sustained by the breach. One of the most common expressions which is used in discussing the term "liquidated damages" is "penalty." And it is frequently said that a penalty can not be recovered, but that liquidated damages may be. A penalty may, in this connection, be defined as an amount fixed by the parties to a contract to be paid by one of them in case of breach, which is greatly, or perhaps grossly, in excess of the damages which may actually be suffered from such a breach. When the amount fixed is held to be a penalty, such amount can not be recovered but only the actual damages suffered.

A case which well illustrates this view is one in which the defendant entered into a bond to pay $10,000 in case he failed to secure releases, within a year, from certain parties having claims against him. One of the claims amounted to only $9.80, and failure to obtain a release of this claim would have made the entire amount of the bond due and payable. The Supreme Court held that the $10,000 referred to was a penalty and not liquidated damages, and a judgment for 1 cent was affirmed.[85] That the parties to a contract have described the amount to be paid in case of a breach as "liquidated damages" or as a "penalty" is not conclusive upon the point,[86] although the term used by the parties has been held to have some weight.[87]

In a certain case the defendant hired a yacht for four months for $10,000 and agreed in the event he failed to return it to pay $75,000, which was stated to be the value of the yacht for the purpose of the contract. The yacht was destroyed, and suit was brought for the recovery of the $75,000. The Supreme Court affirmed a judgment for this amount, and in doing so, said in part:

> Whether a particular stipulation to pay a sum of money is to be treated as a penalty or as an agreed ascertainment of damages, is to be determined by the contract, fairly construed, it being the duty of the court always, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract.[88]

In 1904 an agreement was entered into for the erection of two laboratory buildings for the Department of Agriculture in Washington. The contract called for the completion of the buildings in 30 months, and for a delay of 101 days beyond the contract period the Government deducted $200 a day, the amount stipulated in the contract as liquidated damages, a total of $20,200. Later suit was brought against the Government for the recovery of this amount. In holding

[85] Bignall *v.* Gould, 119 U. S. 495.
[86] Northwestern Terra Cotta Co. *v.* Caldwell, 234 Fed. 491, 496.
[87] Tayloe *v.* Sandiford, 7 Wheat. 13.
[88] Sun Printing & Publishing Ass'n. *v.* Moore, 183 U. S. 642.

that no recovery could be had, the Supreme Court of the United States said:[89]

> Courts will endeavor, by a construction of the agreement which the parties have made to ascertain what their intention was when they inserted such a stipulation for payment, of a designated sum or upon a designated basis, for a breach of a covenant of their contract, precisely as they seek for the intention of the parties in other respects. When that intention is clearly ascertainable from the writing, effect will be given to the provision, as freely as to any other, *where the damages are uncertain in nature or amount or are difficult of ascertainment, or where the amount stipulated for is not so extravagant, or disproportionate to the amount of property loss, as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention, or oppression.* There is no sound reason why persons competent and free to contract may not agree upon this subject as fully as upon any other, or why their agreement, when fairly and understandingly entered into with a view to just compensation for the anticipated loss, should not be enforced.

The number of cases relative to liquidated damage provisions involving cooperative associations is not large. In a California case[90] the by-laws of the association, which were signed by the members, provided that members should pay 50 cents per box as liquidated damages for every box of fruit which was not marketed through the association. The defendant marketed 568 boxes outside the association, and it brought suit for $284 and recovered. The court, among other things, said that "the existence and life of the association itself depended upon its being furnished fruit to dispose of in the public market," and that the "standing of the association as a marketing concern" would be affected by a reduction in the amount of fruit marketed.

In two New York cases[91] involving milk associations, provisions in by-laws and contracts for liquidated damages of $2 per cow during the period that milk was not delivered in accordance with the contracts involved were upheld. In an Alabama case[92] the by-laws provided that members should pay the association 3 per cent on the gross selling price of all produce disposed of by them, whether sold through the association or outside, and although the judgment of the lower court was reversed by the Supreme Court of that State on another point, it expressed the view that the by-law was valid and binding. Mention was made of the necessity for providing income for the association, and of the expense the association incurred in preparing to handle and in being in readiness to handle the produce of its members. A case[93] decided by the Supreme Court of Washington in 1921, involving the right of an association to obtain

[89] Wise *v.* United States, 249 U. S. 361.

[90] Anaheim Citrus Fruit Ass'n *v.* Yeomen, (Calif.) 197 Pac. 959.

[91] Bullville Milk Producers' Ass'n. *v.* Armstrong, 178 N. Y. S. 612; Castorland Milk & Cheese Co. *v.* Shantz, 179 N. Y. S. 131.

[92] Ex Parte Baldwin County Producers' Corporation, 203 Ala. 345, 83 So. 69.

[93] Washington Cranberry Growers' Ass'n. *v.* Moore, (Wash.) 201 Pac. 773, 204 Pac. 811.

an injunction to prevent a member from disposing of produce outside of the association, is to be regarded as a decision indicating that a liquidated damage clause provision is valid.

In the New York and Alabama cases referred to it was claimed that the provisions relative to liquidated damages were invalid on the ground that they restrained trade. It was also claimed in the Washington case just discussed that the contract involved was in restraint of trade. But the court in each instance overruled this contention. However, in two Iowa cases by-laws providing for the payment of a stipulated amount in case a member disposed of his produce or live stock to a competitor in a particular market were held invalid on the ground that they restrained trade or competition. The by-laws involved in the first [94] of the two Iowa cases to be decided provided that any member of the association should forfeit 5 cents for every hundredweight of produce or live stock sold to any competitor of the association. The association bought and sold the produce and live stock of nonmembers as well as that of members. The by-law in question did not provide that the sum to be paid by members in case they sold to competitors was to be regarded as liquidated damages, but it is doubtful if any weight is to be attached to this fact. The court emphasized the fact that the association was something more than a mere selling agency, as it dealt with members and nonmembers. Some weight was apparently attached to the fact that the association often paid nonmembers more for their hogs than it paid members.

In a later case [95] the Supreme Court of Iowa held a by-law of a cooperative association invalid as in restraint of competition which, among other things, provided that any member should pay 1 cent per bushel as liquidated damages for all grain which he might sell to competitors of the association who might offer more for grain than the association and 5 cents per 100 pounds for all hogs and cattle so sold. It appeared that a member sold 13,000 pounds of pork and 4,000 bushels of oats to competitors of the association in a particular market, and the association attempted to deduct $10.50 on this account, in accordance with the by-law, from dividends amounting to $45.25 which were due him. The member then brought suit against the association to recover the entire amount, $45.25, and won. In holding the by-law invalid in this case, the court did so on the authority of the earlier case which has been discussed.

In a Colorado case [96] a by-law provided that stockholders might sell grain to competitors of the association in a particular town, by

[94] Reeves *v.* Decorah Farmers' Cooperative Society, 160 Iowa 194, 140 N. W. 844, 44 L. R. A. (N. S.) 1104).

[95] Ludewese *v.* Farmers' M. C. Co., 164 Iowa 197, 145 N. W. 475.

[96] Burns *v.* Wray Farmers' Grain Co., 65 Colo. 425, 176 Pac. 487.

paying 1 cent per bushel to the association for all grain so sold. A stockholder who had agreed to the by-law sold 3,500 bushels of grain to a competitor of the association, and it brought suit against him to recover $35. The by-law was held invalid on the ground that it was in restraint of competition, and the association lost the suit. In this case the association dealt with members and nonmembers.

In many of the States there are statutory provisions relative to liquidated damages, and such provisions should be carefully heeded.[97] Whether the provision in the by-law or the contract of an association which purports to require a member to pay a certain sum of money to the association in case he disposes of produce or live stock outside the association will be held valid in a particular State will depend upon the constitution, statutes, and general law thereof.[a]

In all States the amount named as liquidated damages should be a reasonable one and not an amount manifestly in excess of the damages that may be suffered. The by-laws in the Iowa and Colorado cases were held invalid on the theory that they were opposed to public policy in that they tended to restrain trade or competition. There are a number of other cases which uphold the legality of a liquidated damage clause provision.[a]

RUNNING WITH LAND.

Contracts entered into by cooperative associations with their members sometimes contain clauses which provide that the contract shall "run with the land"; that is, that the purchaser of the farm shall be obligated by the contract entered into by a former owner of the farm with the association. Is such a provision binding on the purchaser of the farm? Of course, if the cooperative association and the purchaser of the farm acquiesce in the matter no question would arise. But in case the purchaser of the farm refuses to recognize the provision in the contract referred to, what is the

The only case that has been found relative to a cooperative association in which this question was raised is an Oregon one.[98] In this case the contract involved contained a provision reading as follows:

> It is understood that the conditions herein contained shall run with the land on which said berries are to be raised and shall bind the parties herein, their heirs, administrators, and assigns.

The court said with reference to this provision:

> The clause providing that the covenants in the agreement should "run with the land" was no doubt considered important. Although it is doubtful whether it could be enforced in an action at law. * * * Whether an equitable remedy would arise out of such a covenant need not here be considered.

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[97] Stark *v.* Shemada, (Calif.) 204 Pac. 214.

[a] Poultry Producers of Southern Calif. *v.* Barlow, (Calif.) 208 Pac. 93; Washington Cooperative E. & P. A. *v.* Taylor, (Wash.) 210 Pac. 806; Tobacco Growers' Association *v.* Jones, (1923) —— North Carolina ——.

[98] Phez *v.* Salem Fruit Union, 201 Pac. 222, 205 Pac. 970.

It is certain that a purchaser of a farm who had no notice of such a provision in the contract of his predecessor with a cooperative association would not be bound either in law or in equity.[99]

INTERFERENCE BY THIRD PERSONS.

It is a general rule of law, where a stranger to a contract wrongfully induces a party to a contract to commit a breach thereof or disables such party from performing the contract, that the injured party to the contract has a cause of action against the wrongdoer for the loss suffered.[1] This principle was applied in an Oregon case[2] in which it appeared that an association composed of growers of loganberries entered into a contract with a buyer of the berries. The association had contracts with its members obligating them to deliver loganberries to it for delivery to the buyer. The members failed to deliver the berries to the association, and the buyer brought suit against the association and its members. The members claimed that they could not be sued, as the contract was with the association and not with them. In answer to this contention the court said:

> If the defendants be regarded as strangers to the contract of sale between the fruit union and plaintiff, as contended by defendants, the complaint is still sufficient as to the defendant growers under the rule that where a stranger wrongfully induces another to commit a breach of contract, or intentionally disables such other from discharging the obligations of his contract, the wrongdoer is liable in damages, or in a proper case may be enjoined from carrying out his wrongful purposes.

PROMISSORY NOTES.

It is a practice more or less followed by nonstock cooperative associations to receive the notes of their members for specified amounts for the purpose of using them as collateral for loans that may be necessary in the conduct of the association's business and for other purposes. The exact character of such notes depends upon the terms and conditions under which they are given and, of course, upon the law of the particular State. The by-laws of an association usually set forth the agreement between the association and the members relative to the notes, and this agreement would probably in all cases determine the character of the notes as between the association and a member and whether the association could successfully sue a member on such a note. However, this would not necessarily be true, as will be shown later, as between a third person who had received the note of a member from the association.

If the notes executed by the members of an association and delivered to it are accommodation notes—that is, notes executed without

[99] Sjoblom *v.* Mark, 103 Minn. 201, 114 N. W. 746, 15 L. R. A. (N. S.) 1135.

[1] Angle *v.* Chicago, St. Paul Ry., 150 U. S. 1; Westinghouse Co. *v.* Diamond S. F. Co., 268 Fed. 121; Beckman *v.* Masters, 195 Mass. 205, 11 L. R. A. (N. S.) 201.

[2] Phez Co. *v.* Salem Fruit Union, 201 Pac. 222, 205 Pac. 970.

consideration and for the purpose of enabling the association to borrow money or obtain credit thereon—then it is settled that the association could not successfully sue a member on such a note. The maker of an accommodation note is known as the accommodation maker. He receives nothing for executing the note and signs it to enable the one in whose favor it is drawn to obtain money or credit from some third party. The fact that a note or other negotiable instrument, no matter what its character, was executed without consideration can always be shown as between the original parties. It furnishes the maker with a complete defense as against the original payee.

If a negotiable note, whether accommodation or otherwise, has been sold, delivered, or transferred before due to a third person in good faith and without notice and for a valuable consideration, the note is enforceable against the maker without reference to intervening equities. This rule is settled.[3] However, where an accommodation note is delivered after it is due, although transferred in good faith to a third person and for a valuable consideration, the courts are divided as to whether the maker of the note may plead intervening equities as a defense against the holder.

The general rule, without special regard to accommodation notes, is that one who takes a note or other negotiable instrument after it is due takes it subject to all the equities or defenses that existed between the original parties.[4] For instance, if a note is given without consideration, this could be shown by the maker when sued by one who took the note after it was due.[5]

In the eyes of the law the fact that the note was not paid when it was due is notice to the party taking it from the former holder that there is some defect in the paper. However, with respect to accommodation paper, in view of the fact that it is always given without consideration, the courts in a majority of the States have refused to allow the maker to plead a want of consideration, although the note was taken after it was due.[6] But in some jurisdictions the maker of an accommodation note may successfully plead a want of consideration even as against one who received it in good faith and for a valuable consideration from the original payee.[7]

Where a note is payable on demand, the general rule as to ordinary negotiable commercial paper is that one who takes it an unreasonable time after its execution takes it subject to all defenses

[3] National Bank of Commerce *v.* Sancho Packing Co., 186 Fed. 257.
[4] Otis Elev. Co. *v.* Ford, 27 Del. 286, 88 Atl. 465.
[5] Hill *v.* Shield, 81 N. C. 250, 31 Am. R. 499.
[6] Naef *v.* Potter, 226 Ill. 628, 80 N. E. 1084, 11 L. R. A. (N. S.) 1034.
[7] Chester *v.* Dorr, 41 N. Y. 279; Peale *v.* Addicks, 174 Pa. 549.

that existed between the original parties.[8] Of course, if the maker would not have a defense to a suit on the note if brought by the original payee, he would not have a defense to a suit instituted by one who took the note from the original payee either before or after maturity. With respect to accommodation paper payable on demand, in those jurisdictions where a want of consideration may be shown by the maker as against one who took such paper after it was due, the maker may successfully plead this defense as against one who took the demand accommodation note an unreasonable time after its execution. In a North Dakota case[9] it was said: "It is well established that a note payable on demand is due within a reasonable time after its date, and there are practically no authorities which hold that such a reasonable time can be extended beyond a year."

In a doubtful case it would be a question for the jury to determine whether a note had been sold or delivered as collateral for a loan an unreasonable length of time after its execution. In those States where the defense of a want of consideration can not be successfully made by the maker of accommodation paper as against one who took it after it was due, it follows that he could not make it as against one who took a demand accommodation note an unreasonable time after its execution. A note executed by a member of a cooperative association and delivered to it, and on which the association could not successfully sue the member, and on which money had not been borrowed or credit obtained, is not a part of the assets of the association. In case the association fails or goes into the hands of a receiver, the receiver could not enforce such a note against the member, for he stands in no better position than the association.[10] On the other hand, if the note is one on which the association could successfully sue, it follows that it is part of the assets of the association, and a receiver would be able to maintain a suit thereon.

AGENCY.

COOPERATIVE ASSOCIATIONS AS AGENTS.

As a general rule, whatever an individual may do in person he may do through an agent. And the doctrine is well established that one who acts through an agent acts himself. An agent derives all of his authority from his principal, the one for whom he is acting. Cooperative associations frequently act as agents for members in the sale of produce or the purchase of supplies, and it is therefore impor-

[8] Otis Elev. Co. *v.* Ford, 27 Del. 286, 88 Atl. 465.

[9] Adan *v.* Grand Forks Merc. Co., 24 N. D. 645, 140 N. W. 725, 47 L. R. A. (N. S.) 246.

[10] Rankin *v.* City Nat'l Bank, 208 U. S. 541; Skud *v.* Tillinghast, 195 Fed. 1; In Taskers Estate, 182 Pa. 122.

tant to consider the rights and liabilities of such associations and of their members under these circumstances.

A case[11] decided in 1922, by the Supreme Court of Washington, illustrates one of the important problems which may arise. The Peach Fruit Growers' Co. entered into a contract in its name covering the sale and delivery of fruit of its members. Certain of the members of the Fruit Growers' Co. delivered a part of their fruit to plaintiff, but sold and disposed of a quantity thereof to another dealer. Plaintiff brought suit against the members in question to recover an amount equal to the profits which it claimed it would have made if the members had delivered all the fruit in accordance with the contract. The contract as stated was with the Fruit Growers' Co., and did not state that it was made for the benefit of the members. Defendants claimed that for this reason they could not be sued on the contract. The court held that plaintiff could maintain a suit against the defaulting members for the reason that the members had delivered some fruit to plaintiff under the contract. In this connection the court said: "If a principal not disclosed by a contract made by and in the name of his agent subsequently claims the benefit of the contract, it thereby becomes his own to the same extent as if his name originally appeared as the contracting party."

In a companion case,[12] decided at the same time and involving the same contract, the facts being that the members sued had not delivered any fruit under the contract, and hence it could not be said, as was said in the other case, that they had claimed the benefit of the contract, it was held that the plaintiff could not maintain a suit against the members involved, and that if any suit was to be maintained it would have to be against the Fruit Growers' Co. It is clear that in either of the cases just discussed the buyer of the fruit could have sued the Fruit Growers' Co. for the loss sustained through failure to deliver all the fruit contracted for. Of course, if in the contract with the buyer it had been stipulated that it should look to the company exclusively, the members could not have been successfully sued in either case.

It should be noted in this connection that a provision in the contract of an association with its members can not be invoked to relieve the members of liability to third persons under circumstances similar to those involved in the cases just discussed, unless such provision was brought to the attention of the persons with whom the association contracted prior thereto.[13] In the Federal courts, and it is believed in most States, the fruit buyer in the last Washington case referred to above would have been allowed to sue the members

[11] Barnett Bros. *v.* J. F. Lynn et ux., (Wash.) 203 Pac. 389; see also (Oreg.) Phez *v.* Salem Fruit Union, 201 Pac. 222, 205 Pac. 970.

[12] Barnett Bros. *v.* S. F. Lynn et ux., (Wash.) 203 Pac. 387.

[13] Kruse *v.* Seiffert, etc., Lumber Co., 108 Iowa 352.

who had not delivered a part of their fruit. The Supreme Court of the United States has said: "The contract of the agent is the contract of the principal and he may sue or be sued thereon, though not named therein."[14] In other words, the general rule appears to be that where a contract is entered into with an agent, the agent contracting in his own name, the person for whom the agent is acting, the principal, may sue the other party on the contract, and in turn the principal may be sued by such party; and the fact that the existence of the principal is known or unknown to the opposite party at the time the contract is made is immaterial.[15] Of course, as suggested above, a cooperative association could include a provision in its contract with one with whom it was dealing that would control the situation.

In connection with the general matter now under discussion it should be remembered that members of an association are liable to suit, or may sue, not because they are members of the association, but because they are the principals for whom the association acted. It will be remembered that an incorporated cooperative association is an artificial entity, separate and apart from its members. No case has been found where members of an association have been held liable for wrongful acts of negligence of an association while engaged in acting as agent for members in the transaction of certain business or in the doing of certain work authorized by them, but no reason is apparent why they could not be so held in a proper case.

The true conception of this matter can be readily understood when one bears in mind that he is liable, as a general rule, for all acts of his agent while the agent is acting within the scope of his employment. The character of the agent, whether an individual, partnership, or incorporated association, is immaterial. It is upon this theory that automobile owners, whether individuals or corporations, are held liable for injuries to others caused by the negligent driving of their machines by their agents or employees. It is no answer that an agent was not authorized to do the particular act which caused injury or loss if it was done while in the course of the business of his principal or employer.

In a case decided by the Supreme Court of Oregon, in 1920,[16] the plaintiff was the holder of 24 shares of capital stock of the defendant corporation. He entered into contract with the defendant to consign milk produced by him to parties designated by the defendant, and the defendant agreed to collect all moneys due him on such

[14] Ford *v.* William, 62 U. S. 287.

[15] Chapman *v.* Java Pac. Line, 241 Fed. 850 and numerous cases therein cited.

[16] Steelman *v.* Oregon Dairymen's League, Inc., (Oreg.) 192 Pac. 790; see also Washington Cooperative E. & P. Ass'n *v.* Taylor, (Wash.) 210 Pac. 806.

consignments and pay the same to him, less the commission for services as agent of 5 cents per 100 pounds of milk. Other members of the league apparently entered into contracts similar to the one signed by plaintiff. Later a regular purchaser of milk refused to accept delivery of a large quantity shipped by other members of the league, which was then disposed of at less than the contract price. Owing to the loss thus sustained by the producers of this rejected milk, the league in an effort to apportion the loss among the members made deductions from the amount of the sale price of plaintiff's milk, all of which had been accepted and for which the league had received pay. He then brought suit to recover the entire sale price of his milk, less the commission charge of 5 cents per 100 pounds. The court held that he could recover, and in doing so said:

> It was competent for the plaintiff as an individual, irrespective of his holding stock in the defendant corporation, to contract with it as effectually and to all intents and purposes as if he had no share of the stock of the defendant. The contract itself is the measure of the rights and liabilities existing between the plaintiff and the defendant as contracting parties. * * * It was not within the scope of its (defendant's) contract, or of its articles of incorporation or by-laws, as they appear in evidence, to apportion gains and losses among the several stockholders.

This case emphasizes the fact that a cooperative association which is acting as agent for its members does not have authority, unless conferred in some way, to adjust such losses between members. Excessive advances or overpayments made by an association to its members have a different status and apparently may be recovered by the association.[a]

COOPERATIVE ASSOCIATIONS LIABLE FOR ACTS OF AGENTS.

Incorporated cooperative associations, like other corporations, are liable for the acts of their agents while such agents are acting within the scope of their employment. A corporation may be liable for assault and battery, conversion, nuisance, trespass, libel, and slander,[17] malicious prosecution, wrongful arrest, false imprisonment, fraud, and deceit.[18] It may also be guilty of crimes.[19] It is apparent that all of the various acts enumerated would have to be done by the officers, agents, or employees of a corporation, as a corporation can act in no other way. There is nothing in the nature of an incorporated cooperative association to relieve it from liability under circumstances where any other type of corporation would be liable, and undoubtedly they may be held liable in a proper case for any of the matters mentioned above.

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[a] California Raisin Growers' Ass'n. *v.* Abbott, 160 Calif. 601, 117 Pac. 767; Farmers' Union Cooperative S. A. of Natoma *v.* Schultze, (Kan.) 212 Pac. 670; Re Joseph Murphy Co., 214 Pa. 258, 5 L. R. A. (N. S.) 1147.

[17] Buckeye Cotton Oil Co. *v.* Sloan, 250 Fed. 712.

[18] Fletcher Cyclopedia Corporations, sec. 3336.

[19] Fletcher Cyclopedia Corporations, sec. 5369.

MONOPOLIES—RESTRAINT OF TRADE.

MONOPOLIES.

The term "monopoly" originally referred to a grant by the sovereign of the exclusive right to deal in a certain commodity or to engage in a certain occupation. Queen Elizabeth of England granted monopolies to many of her subjects whom she desired to reward. There were monopolies in salt, starch, calfskins, and many other things. The question of the legality of such monopolies arose in 1602, in a case in which the plaintiff had received the exclusive privilege for 21 years to manufacture playing cards. The defendant impinged this right, and plaintiff brought suit for damages. The defendant pleaded the illegality of the monopoly, and the court held the grant of the monopoly void.[20] Parliament, in 1624, enacted a statute abrogating monopolies save in certain instances.

The term "restraint of trade" originally referred to instances where a man had sold his business and agreed with the purchaser that he would not engage in the same business either at that place or any other place or within a given area for a given period of time or at any time. All such agreements appear to have been illegal in the early days of the common law on the theory that they reduced the opportunities of the seller to make a living and tended to monopoly.[21] Later such agreements were upheld if deemed reasonable. At this time they are generally upheld if the restrictions on the right of the seller to engage in business are no greater than those reasonably necessary for the protection of the buyer.[22]

Gradually the terms "monopoly" and "restraint of trade" took on a broader meaning. The term "monopoly" has come to mean the concentration of business in the hands of a few [23] or a combination of persons or corporations for the purpose of raising or controlling the prices of merchandise or any of the necessaries of life.[24] The expression "restraint of trade" is now used as the equivalent of restraint of competition and both terms are employed to describe a situation where illegal means are used to eliminate or restrict competition, or to control prices, or to form a monopoly.

This proposition is illustrated by a Kentucky case [25] in which the plaintiffs were the principal buyers of blue-grass seed in that State. They entered into a secret partnership under which each of the buyers was to continue to operate apparently independently. However, the scheme contemplated that they would secure control of the

[20] Darcy *v.* Allen, 11 Co. 84.
[21] Anson on Contracts, sec. 255.
[22] Lumbermen's Trust Co. *v.* Title Insurance & Inv. Co., 248 Fed. 212.
[23] National Fireproofing Co. *v.* Mason Builders Assn., 169 Fed. 259, 26 L. R. A. (N. S.) 148.
[24] Chicago, W. & V. Coal Co. *v.* People, 114 Ill. App. 75.
[25] Brent *v.* Gay, 149 Ky., 615, 149 S. W. 915, 41 L. R. A .(N. S.) 1034.

market for blue-grass seed and suppress competition. The scheme involved the fixing of the price to be paid for seed, the distribution among themselves of seed offered for sale, the price at which seed should be sold, and the sharing of profits and losses. The defendant entered into a contract with a secret agent of plaintiff under which he agreed to sell a quantity of blue-grass seed. He refused to carry out his contract, and suit was brought against him. The Supreme Court of Kentucky, in holding the contract invalid as part of an unlawful scheme, said * * *

> Taking for a foundation the principle that illegal and unreasonable restraint of trade is obnoxious to the spirit of the law * * * this principle will be extended * * * to embrace every condition in which an unlawful attempt is made to restrain trade and control the market and suppress competition by whatever means these ends are sought to be accomplished.

This case illustrates another well-settled principle, namely, that where a contract is held to be in restraint of trade and has not been performed the court will refuse to enforce it or allow damages for its breach. The courts are practically unanimous in holding unlawful all agreements and combinations by and between independent and separate dealers for the purpose of controlling or fixing the prices of commodities.[26] A combination to fix the price of an article of prime necessity was a criminal conspiracy at common law.[27] Many of the cases which have come before the courts involving the propositions discussed under this heading are difficult to reconcile, and many of them are undoubtedly in conflict. The whole subject of monopolies and restraint of trade and allied matters is now more or less comprehensively dealt with by statutes.

SHERMAN AND CLAYTON ACTS.

In 1890 Congress passed the Sherman Act, the first section of which reads as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding $5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The Clayton Act, which supplements the Sherman Act, was passed by Congress in 1914. The Sherman Act was construed in the Standard Oil case in 1910, and it was held that it prohibited all contracts and combinations which amount to an unreasonable or undue restraint of trade in interstate commerce.[28] This conclusion was

[26] R. C. L. 38; People *v.* Butler, (Mich.) 192 N. W. 685.
[27] 16 R. C. L. 40; State *v.* Erickson (Wash.), 103 Pac. 796.
[28] Standard Oil Co. *v.* United States, 221 U. S. 1.

reached on the theory that the term restraint of trade had a settled meaning at the time this statute was passed and that Congress used the expression in the same sense as that in which it was then commonly employed. Under the antitrust acts referred to, the Supreme Court of the United States in determining whether a defendant is engaged in illegally restraining trade will look largely to how it employs its power and strength.

It was upon this theory that the Supreme Court refused to order the dissolution of the United States Steel Corporation,[29] although it controlled approximately 50 per cent of the steel business of the country. In the opinion in this case the court enumerates some of the practices which had been employed by other combinations and which operated to bring them within the condemnation of the statute. The offending combinations referred to include the American Tobacco Co.[30] and the Standard Oil Co.[31] Some of the practices in question are mentioned in the following quotation from the opinion:

> The corporation, it was said, did not at any time abuse the power or ascendancy it possessed. It resorted to none of the brutalities or tyrannies that the cases illustrate of other combinations. It did not secure freight rebates; it did not increase its profits by reducing the wages of its employees—whatever it did was not at the expense of labor; it did not increase its profits by lowering the quality of its products, nor create an artificial scarcity of them; it did not oppress or coerce its competitors—its competition, though vigorous, was fair; it did not undersell its competitors in some localities by reducing its prices there below those maintained elsewhere, or require its customers to enter into contracts limiting their purchases or restricting them in resale prices; it did not obtain customers by secret rebates or departures from its published prices; there was no evidence that it attempted to crush its competitors or drive them out of the market, nor did it take customers from its competitors by unfair means, and in its competition it seemed to make no difference between large and small competitors.

This decision makes it clear that the legality of a large industrial unit depends on its acts and conduct and not on its size. Bigness which has come about through development along normal lines and without unfair practices or wrongful acts does not constitute illegality.

In the American Tobacco Co., in the Standard Oil Co., and in the United States Steel Corporation cases the legality of a large industrial unit or combination was involved. In each of these cases the industrial unit or combination as it existed at the time suit was brought was the result of the amalgamation or uniting of a number of smaller organizations. As already indicated in the discussion under this heading, there are ways in which the antitrust laws may be violated other than through the illegal organization and operation

[29] United States *v.* U. S. Steel Corp., 251 U. S. 417.
[30] United States *v.* American Tobacco Co., 221 U. S. 106.
[31] Standard Oil Co. *v.* United States, 221 U. S. 1.

of large combinations. In the case[32] involving the Eastern States Retail Lumber Dealers' Association it appeared that this association was made up of a number of local retail dealers' associations in various States. Blacklists of all wholesale lumber dealers who sold direct to consumers or builders were circulated by the Eastern States among the local associations of lumber dealers, who in turn circulated such lists among the retail dealers. The evident purpose was to discourage the retail dealers from dealing with such wholesale dealers. The Supreme Court held that such conduct was unlawful as "Unduly suppressing competition," and affirmed the judgment of the lower court enjoining the further circulation of such reports or blacklists.

A manufacturer or dealer, under the decisions of the Supreme Court, can not enter into agreements with those to whom he sells that they shall not resell except at prices named by him.[33] This is based on the theory that such agreements destroy competition. An unincorporated association[34] of hardwood-lumber manufacturers of various States conducted for the purpose, so it was ascertained, of limiting production and increasing prices through the circulation of reports setting forth facts concerning lumber on hand, sale prices, and rate of production, was held by the Supreme Court to constitute a combination and conspiracy in restraint of interstate commerce and was therefore unlawful. The method employed was called the "Open Competition Plan." Under it each member of the association made daily, weekly, and monthly reports giving minute details of their business. Later these reports were sent out in a condensed form to each of the members of the association.

A conspiracy to "run a corner" in the available supply of a staple commodity such as cotton, normally a subject of interstate commerce, and thereby to enhance artificially its price throughout the country is within the terms of section 1 of the Sherman Act, which is quoted earlier in this discussion.[35]

STATE STATUTES EXEMPTING FARM ORGANIZATIONS.

A large number of the States have statutory provisions which provide that the antitrust laws of the State shall not be applicable to associations of farmers or that associations of farmers incorporated under the statute in which this provision appears shall not be subject to such laws. The following paragraph on this subject, from the act of 1921 of North Carolina providing for the incorporation of

[32] Eastern States Retail Lumber Dealers' Assn. *v.* United States, 234 U. S. 600.

[33] Dr. Miles Medical Co. *v.* Park & Sons Co., 220 U. S. 373; United States *v.* A. Schrader's Son, Inc., 252 U. S. 85; Federal Trade Commission *v.* Beech-Nut Packing Co., 42 Sup. Ct. Rep. 150.

[34] American Column & Lumber Co. *v.* United States, 66 L. Ed. 159.

[35] United States *v.* Patten, 226 U. S. 525.

cooperative associations, is similar to that found in a number of the States:

> No association organized hereunder shall be deemed to be a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or fix prices arbitrary, nor shall the marketing contracts or agreements between the association and its members, or any agreements authorized in this act be considered illegal or in restraint of trade.[a]

In California the antitrust act provides that,

> No agreement, combination, or association shall be deemed to be unlawful * * * the object and business of which are to conduct its operations at a reasonable profit or to market at a reasonable profit those products which can not otherwise be so marketed.

In Ohio a statute was enacted in 1921 which places jurisdiction over cooperative associations which have met certain requirements of the law under the public utilities commission of that State. It is therein made the duty of the commission, in case it believes that any such association "Restrains trade or lessens competition to such an extent that the price of any agricultural product is enhanced beyond the cost of production plus a reasonable profit," to proceed against such an association for the purpose of causing it to "Cease and desist from so restraining trade and lessening competition in such article." The Ohio statute in many particulars is similar to the Capper-Volstead Act, which will be discussed later.

SECTION 6 OF THE CLAYTON ACT.

This section reads as follows:

> That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

It seems to be generally agreed that this section would appear to prevent the dissolution of an organization of farmers which meets the conditions it prescribes, namely, that it is a "labor, agricultural, or horticultural organization"; that it is "instituted for the purposes of mutual help," and does not have "capital stock"; and last, is not "conducted for profit." However, the few decisions of the courts relative to this section indicate that it does not enable them, if desired, to adopt methods of conducting their operations denied to other lawful business organizations. In a case[36] decided by the Supreme

[a] Tobacco Growers' Cooperative Association *v.* Jones, (1923) —— North Carolina ——; Hollingsworth *v.* Texas Hay Ass'n., (Texas) 246 S. W. 1068.

[36] Duplex Co. *v.* Deering, 254 U. S. 443; see also Buyer *v.* Guillan, 271 Fed. 65.

Court involving the legality of a secondary boycott by a labor organization it was said:

> As to section 6, it seems to us its principal importance in this discussion is for what it does *not* authorize and for the limit it sets to the immunity conferred. The section assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the antitrust laws shall be construed to forbid the existence and operation of such organizations or to forbid their members from *lawfully* carrying out their *legitimate* objects; and that such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade. But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade as defined by the antitrust laws.

In a certain case[37] the Aroostook Potato Shippers' Association, acting through a committee, blacklisted certain buyers of potatoes. Members of the association under penalty were forbidden to deal with such buyers. Persons outside the association who dealt with persons so blacklisted were also blacklisted and boycotted. The defendants, members of the association, were indicted for a conspiracy in restraint of trade and fined. The court said with reference to the contention that section 6 relieved the defendants:

> I do not think that the coercion of outsiders by a secondary boycott, which was discussed in my opinion on the former indictment, can be held to be a lawful carrying out of the legitimate objects of such an association. That act means, as I understand it, that organizations such as it describes are not to be dissolved and broken up as illegal, nor held to be combinations or conspiracies in restraint of trade; but they are not privileged to adopt methods of carrying on their business which are not permitted to other lawful associations.

Section 6 of the Clayton Act is still in effect and is not repealed by the Capper-Volstead Act.

RIGHT TO SELECT CUSTOMERS.

It is undoubtedly settled that at common law and in the absence of a statute requiring him to do so a trader or dealer can refuse to enter into business relations with any person whomsoever, and his reason or lack of reason for so doing is immaterial. In a certain case it was said: "We had supposed that it was elementary law that a trader could buy from whom he pleased and sell to whom he pleased, and that his selection of seller and buyer was wholly his own concern."[38] This principle applies just as fully to cooperative

[37] United States *v.* King, 229 Fed. 275, 250 Fed. 908.

[38] Great Atlantic & Pacific Tea Co. *v.* Cream of Wheat Co., 227 Fed. 46; see also United States *v.* Colgate Co., 250 U. S. 300; Leech *v.* Farmers' Tobacco Co., 171 Ky. 791, 188 S. W. 886.

associations or other corporations as it does to individuals. However, the courts have never held that two or more independent dealers may agree without a legal cause not to do business with another. Again, when an individual, firm, or corporation does not rest content with refusing to have business relations with a certain person, but endeavors to compel third persons to refrain from having business relations with such person, the law is violated. This was the situation in the case involving the Aroostook Potato Shippers' Association referred to above. Had the association and its members simply refused to deal with the buyers in question there is little doubt but that the law would not have been violated, but when efforts were made to compel third persons to refrain from dealing with such buyers the law was violated.

CALIFORNIA ASSOCIATED RAISIN CO. CASE.

In September, 1920, the Government brought suit against the California Associated Raisin Co., charging it with monopolizing and restraining trade in violation of the antitrust laws. In September of that year a stipulation was entered into in lieu of an injunction requiring the Raisin Co. to release more than one-fourth of its holdings of raisins (40,000 tons) to competitors and to abandon the "firm at opening price" contract and those involving guaranties against decline. It was also required to announce through advertisements in the newspapers of Fresno County, Calif., its willingness to release all grape growers who claimed that they were coerced into signing contracts with it.

This case was disposed of in January, 1922, by the entry of a consent decree which enjoins and restrains the Raisin Co. from eliminating or decreasing competition in interstate or foreign commerce in raisins or raisin grapes by the purchase, lease, or control of the plant of any competitor or by means of any contract or concert of action with an existing or prospective competitor. It is also enjoined from securing or attempting to secure contracts with growers of raisin grapes by means of coercion or duress, or which eliminate or restrict or prevent others from freely competing to secure contracts with the growers of raisin grapes in California. All contracts entered into with raisin growers must contain a provision authorizing the grower to terminate the contract at the end of the first three years thereof or at the end of any two-year period thereafter; making or entering into contracts for the sale of raisins under which the quantity of raisins to be delivered to any purchaser or the price to be paid therefor is to be subsequently determined by the Raisin Co., in accordance with the practice known as "firm at opening price" or under which the Raisin Co. agrees to indemnify any purchaser against loss on account of a future decline in the

market price of raisins, are forbidden; purchasing or agreeing to purchase raisins or raisin grapes from a competitor for the purpose of enabling the Raisin Co. to fix the price of such product or to diminish competition; agreeing or combining either among themselves or with others to lessen or eliminate the supply of raisins or decrease the production or supply of raisin grapes or to diminish competition through the destruction or waste of raisins or otherwise; making a contract with a competitor for the packing of raisins exclusively for the Raisin Co. with an agreement of "exclusive dealing"; making a competitor the agent of the Raisin Co., with authority to sell raisins or raisin grapes at fixed prices, or excluding or preventing a competitor from marketing raisins or raisin grapes for himself or another; making contract under which the purchaser is obliged to resell raisins or raisin grapes at prices fixed in advance of such resale; making it a condition of any agreement or understanding that the purchaser of raisins or raisin grapes shall not deal in the products of a competitor of the Raisin Co., are all enjoined.

Jurisdiction over the case was retained by the court for the purpose of enforcing the provisions of the decree or of modifying it in case any of its provisions should be found inappropriate or inadequate. Two of the most significant elements involved in the decree are that the "firm at opening price" contracts must be abandoned and that the resale prices of raisin grapes or raisins can not be fixed by the company.

CAPPER-VOLSTEAD ACT.

The Capper-Volstead Act became a law on February 18, 1922. It is entitled "An Act to authorize association of producers of agricultural products," and reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per cent per annum.

And in any case to the following:

Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

SEC. 2. That if the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached or contained therein a notice of hearing, specifying a day and place not less than 30 days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such associaton to cease and desist from monopolization or restraint of trade. On the request of such association, or if such assocation fails or neglects for 30 days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes. The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall be binding upon such association, the officers, and members thereof.

This act is a statutory declaration by Congress that, so far as interstate or foreign commerce is concerned, farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, in collectively processing, preparing for market, handling, and marketing in such commerce the products of persons so engaged, and that they may make the necessary contracts to effect such purposes. Whatever doubt may have previously existed on this subject is apparently resolved by this statute. However, as stated in the act, "If the Secretary of Agriculture shall have reason

to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby," he may, following a hearing, if he finds that the price of any agricultural product has been unduly enhanced from either of the causes specified, issue an order directing such association to cease and desist from monopolizations or restraint of trade.

This act has no application to purely purchasing associations or cooperative stores, for the reason that it relates only to associations that are composed of farmers, planters, ranchmen, dairymen, nut or fruit growers who are engaged in collectively processing, preparing for marketing, handling, and marketing in interstate and foreign commerce the products of persons so engaged, and then only with such associations as have complied with the conditions of the statute.

The question of whether an association is liable for income taxes is one that is not resolved by this act. Whether an association is liable for income taxes is to be determined by the income tax statutes and the regulations issued under them.

This act does not provide for the incorporation of cooperative associations and makes no provision for their formation. Those interested in organizing or incorporating such associations should look to the laws of their respective States relating thereto. The act does not change nor supersede laws of the various States affecting or relating to the regulation of cooperative associations. So far as this act is concerned, such State laws are all in effect. Compliance with the conditions set forth in this act does not relieve an association from the operation of State laws.

Congress under the Constitution has control over interstate and foreign commerce, and this act deals only with the operations of cooperative associations in such commerce, and then only with such associations as comply with certain conditions prescribed therein. The test which those interested in an association should apply to learn if their association comes within the scope of the act is—does the association meet the conditions set forth therein? These conditions are:

A. "That persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce such products of persons so engaged." This and other language which appears in the act makes it plain that a cooperative association to come within the act must be composed of or made up of pro-

ducers.[39] This is true, whether it is incorporated or unincorporated and whether it is organized with or without capital stock.

B. Associations that desire to come within the act must be operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements: First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or, second, that the association does not pay dividends on stock and membership capital in excess of 8 per cent per annum. And in any case to the following: Third, that the association shall not deal in products of nonmembers to an amount greater in value than such as are handled by it for members.

Associations must comply with either the first or second condition and may comply with both. As the first condition embodies the one-man one-vote principle, all associations operating on this basis, or which elect to operate on this basis, need not, unless they wish to do so, give consideration to the second condition. Of course, an association, if it desires, may operate in accordance with both of these conditions, but it will come within the scope of the act by complying with only one of them, if it complies with the other conditions of the act.

If an association elects to operate under the second condition, dividends on stock or membership capital are limited to 8 per cent per annum. This does not mean that stock may be owned by or sold to nonproducers so far as this act is concerned. Only associations whose stock is held by or whose membership is made up of producers can come within the act. It is not necessary for associations operating under the act to pay dividends in any amount unless they elect to do so. It is entirely a matter of choice with them. If, however, an association elects to operate under the second condition, dividends, if paid, must not exceed 8 per cent per annum.

All associations desiring to operate under the act must meet the third condition, which is that the value of the products handled for nonmembers shall not exceed the value of those handled for members. This condition does not mean that an association shall handle any business for nonmembers. It may do so or not, as it sees fit. If it does handle such business, however, the act specifically provides that the value of the products handled for nonmembers must not exceed the value of the products handled for members.

[39] Undoubtedly, in those isolated instances where nonproducers become members of an association through inheritance, operation of law, or otherwise, contrary to the policy of the association, or where producers cease to be such, the association being one which is incontrovertibly controlled and dominated by its producer members, would not, because of such nonproducer members, if it otherwise complied with the terms of the act, fall without its provisions. Such an association should take such measures as are compatible with law to eliminate and exclude nonproducers from membership.

Under section 2 of the act it is the duty of the Secretary of Agriculture, if he believes that any association operating under it monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason of such monopoly or restraint of trade, to serve upon such association a complaint with respect to such matters, requiring the association to show cause why an order should not be issued directing it to cease and desist from monopolization or restraint of trade. After a hearing, if the Secretary of Agriculture believes that such an association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, the act provides that he shall issue an order reciting the facts found by him and directing such association to cease and desist from monopolization or restraint of trade. If such order is not complied with by the association within 30 days, the Secretary of Agriculture is then required to file a certified copy of the order issued by him, together with certified copies of all records in the matter, in the District Court of the United States in the judicial district in which such association has its principal place of business. The Department of Justice has charge under the act of the enforcement of such order. The District Court of the United States is given jurisdiction to affirm, modify, or set aside the order or to enter such other decree as it may deem equitable.

FEDERAL TRADE COMMISSION.

UNFAIR COMPETITION.

The act[40] of September 26, 1914, created the Federal Trade Commission. The act states that unfair methods of competition in commerce are unlawful and provides that "the commission is empowered and directed to prevent persons, partnerships, or corporations, except banks and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce."

The term "commerce" as defined in the act means commerce, interstate or foreign, or in any Territory of the United States or the District of Columbia. The term "unfair competition" is not defined in the statute. At common law unfair competition consisted in the palming off by one vendor or manufacturer of his goods as those of another.[41] The term "unfair competition" as used in the act undoubtedly means all that it imports at common law and, in fact, it apparently has a broader significance and scope than it had at common law.

The act provides that the commission after a hearing may issue an order requiring the person, firm, or corporation involved to cease

[40] 38 Stat. 717.

[41] Howe Scale Co. *v.* Wyckoff, 198 U. S. 118.

and desist from unfair competition. In the event the order is not obeyed, the commission may apply to the Circuit Court of Appeals of the United States within any circuit where the method of competition in question was used, or where such person, firm, or corporation resides, for the enforcement of its order. Any party against whom an order is issued may appeal to the Circuit Court of Appeals, from which court an appeal lies to the Supreme Court of the United States.

A few illustrations will shed light on the scope of the work of the commission. In 1919 the commission issued an order against Armour & Co. and the Farmers' Cooperative Fertilizer Co. It appeared that the Farmers' Cooperative Fertilizer Co. was a subsidiary of Armour & Co., and that it was not an organization of farmers, as the name implied. The order required the Farmers' Cooperative Fertilizer Co. to show on its letterheads and on its places of business that it was a subsidiary of Armour & Co.

Attempts by an association of harness manufacturers and by a saddle-makers' association to compel the separation of the wholesale and retail harness dealers by refusing to recognize those who engaged in both the wholesale and retail trade as authorized jobbers and to prevent the sale by manufacturers of accessories to such persons was held in a certain case to be unlawful and subject to action by the Federal Trade Commission. In this case, as indicated, the two associations attempted through the membership of each to prevent manufacturers, jobbers, and wholesalers from selling direct to consumers.[42]

The Winsted Hosiery Co. has for many years manufactured underwear which it sells to retailers throughout the United States. It brands or labels the cartons in which the underwear is sold as "Natural Merino," "Gray Wool," "Natural Wool," "Natural Worsted," or "Australian Wool." The Federal Trade Commission [43] instituted proceedings against this company, calling upon it to show cause why use of these brands and labels, alleged to be false and deceptive, should not be discontinued. After appropriate proceedings an order was issued which directed the company to—

> Cease and desist from employing or using as labels or brands on underwear or other knit goods not composed wholly of wool, or on the wrappers, boxes, or other containers in which they are delivered to customers, the words "Merino," "Wool," or "Worsted," alone or in combination with any other word or words, unless accompanied by a word or words designating the substance, fiber, or material other than wool of which the garments are composed in part (e. g., "Merino, Wool, and Cotton"; "Wool and Cotton"; "Worsted, Wool, and Cotton"; "Wool, Cotton, and Silk"), or by a word or words otherwise clearly indicating that such underwear or other goods is not made wholly of wool (e. g., part wool).

[42] Natl. Harness Mfg. Assoc. *v.* Fed. Trade Commission, 268 Fed. 705.
[43] Federal Trade Commission *v.* Winsted Hosiery Co., 42 Sup. Ct. Rep. 384.

The Winsted Hosiery Co. petitioned the Circuit Court of Appeals for the second circuit to set aside the order of the commission, and this was done. The Federal Trade Commission then carried the case by certiorari to the Supreme Court of the United States. That court found that the order of the commission was a proper one, and in upholding the right of the commission to issue the order it said:

> The labels in question are literally false, and, except those which bear the word "merino," are palpably so. All are, as the commission found, calculated to deceive, and do in fact deceive, a substantial portion of the purchasing public. * * * The facts show that it is to the interest of the public that a proceeding to stop the practice be brought. And they show also that the practice constitutes an unfair method of competition as against manufacturers of all-wool knit underwear and as against those manufacturers of mixed wool and cotton underwear who brand their product truthfully. For when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods.

SPECIFIC PERFORMANCE—INJUNCTIONS.

SPECIFIC PERFORMANCE.

"Specific performance may be defined as the actual accomplishment of a contract between parties bound to fulfill it, for a decree for specific performance is nothing more or less than means of compelling a party to do precisely what he ought to have done without being coerced by a court." [44]

May a cooperative association obtain specific performance of its contract with one of its members for the delivery of produce, is a question often asked. It does not permit of a yes or no answer. Specific performance is an equitable remedy. It is fundamental that no one can go into equity to secure specific performance, an injunction, or other equitable relief, where the remedy at law is plain, adequate, and complete. In general, courts of equity will refuse to grant a decree for specific performance if proper compensation for the breach of the contract could be recovered in an action at law. In other words, if full and complete satisfaction could be obtained through the recovery of damages, a court of equity will refuse to decree specific performance. In the case of contracts involving personal property which can be readily purchased in the market, a decree for specific performance will not, as a general rule, be granted. This is on the theory that the injured party could easily acquire personal property like that called for by the contract, and damages would therefore afford a complete remedy.

In a Federal case [45] in which specific performance of a contract for the delivery of oil from wells operated by defendant was decreed it was said:

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[44] 25 R. C. L. 203.

[45] Texas Co. *v.* Central Fuel Co., 194 Fed. 1; see also Amer. Smelt. & R. Co. *v.* Bunker Hill & S. Min. & Co., 248 Fed. 172.

It is now well settled that, when the chattels are such that they are not obtainable in the market or can only be obtained at great expense and inconvenience, and the failure to obtain them causes a loss which could not be adequately compensated in an action at law, a court of equity will decree specific performance.

It will be appreciated from what has been said that whether a decree for specific performance will be granted in a given case depends upon the facts.

If the commodity called for by the contract is one which can be obtained only from the party in question, or if it can not be readily purchased in the market, then a decree for specific performance will generally be allowed. In a New Jersey case[46] the plaintiffs, who conducted a canning factory having a capacity of about a million cans of tomatoes, applied for the specific performance of a contract whereby the defendant agreed to sell to them all the tomatoes grown on certain land. The contract was specifically enforced on the ground that the evidence showed that preparations for the season, which lasted but six weeks, had been based on the capacity of the factory and that tomatoes of a similar kind could not be obtained when needed. The court said:

The business and its needs are extraordinaary in that the maintenance of all of the conditions prearranged to secure the pack are a necessity to secure the successful operation of the plant. * * * The objection that to specifically perform the contract personal services are required will not divest the court of its powers to preserve the benefits of the contract. Defendant may be restricted from selling the crop to others, and, if necessary, a receiver can be appointed to harvest the crop.

The remedy of injunction is often employed to supplement a decree for specific performance, especially in cases like those now under discussion.[a]

INJUNCTIONS.

An injunction is an order issued by a court of equity requiring a party to do or refrain from doing certain acts.[47] Injunctions are usually issued to prevent a threatened injury or to restrain the doing of wrongful acts. They are less frequently granted to require the performance of certain acts. Whether an injunction will be issued depends upon certain well-established equitable principles. It is generally said that the granting of an injunction rests within the sound discretion of the court and that one can not be obtained as a matter of right. However, if the case made out by the applicant for an injunction is perfectly clear, and all the requirements of the law for the issuance of an injunction have been complied with, he is entitled to an injunction as a matter of right.[48]

[46] Curtice Bros. *v.* Catts, 72 N. J. Eq. 831, 66 Atl. 935.
[a] Oregon Growers' Cooperative Association *v.* Lentz, (Oregon) 212 Pac. 811.
[47] 22 Cyc. 740.
[48] Sullivan *v.* Jones & L. Steel Co., 208 Pa. St. 540, 57 Atl. 1065, 66 L. R. A. 712.

What right has a cooperative association to enjoin a member from disposing of his produce contrary to the contract entered into with the association? This question, like the one involving specific performance, can not be answered categorically. It is believed that the first case passed upon by a court of last resort in which a cooperative association obtained an injunction restraining one of its members from disposing of produce which he had contracted to deliver to the association was one decided by the Supreme Court of Washington.[49] This case involved a cranberry association which had entered into contracts with growers under which it was made their exclusive sales agent for the sale and marketing of the cranberries grown by them. The Supreme Court of Washington affirmed the judgment of the lower court granting an injunction in favor of the association which prevented the member from breaching his contract. Since the decision in this case there have been a number of decisions in harmony therewith.[a]

As a rule, when a court grants specific performance, an injunction will be issued to restrain the party from acting contrary to the terms of the order decreeing specific performance. In other words, the remedy of specific performance and the remedy of injunction are both frequently employed in the same case to bring about the result desired. In the Federal case discussed under the head of specific performance, in which specific performance was required of a contract for the delivery of oil, the court also directed that the defendant be enjoined from disposing of the oil in violation of the contract. In other words, the defendant was required to deliver the oil in accordance with the contract and was enjoined from disposing of it in violation thereof. And probably in every case where a court decreed the specific performance of a contract of a cooperative association with one of its members for the delivery of produce, an injunction could be obtained enjoining him from disposing of his produce to other parties. Generally the courts will refuse to decree the specific performance of a contract for personal services or of a contract where the personal element is the dominant one. An extreme illustration of the type of contract referred to is one calling for the painting of a portrait. The personal element might be a factor with a court in refusing to decree the specific performance of a contract of a cooperative association.

Even in cases where the personal element is dominant the courts will, in a proper case, enjoin a party from doing the thing called for by the contract for any other party, but will refuse to require specific performance.

[49] Washington Cranberry Growers' Ass'n *v.* Moore, (Wash.) 201 Pac. 773; also 204 Pac. 811; in accord. Phez *v.* Salem Fruit Union (Oregon), 201 Pac. 222, 205 Pac. 970.

[a] Hollingsworth *v.* Texas Hay Ass'n, (Texas) 246 S. W. 1068; Oregon Growers' Cooperative Ass'n. *v.* Lentz, (Oregon) 212 Pac. 811; Washington Cooperative E. & P. Ass'n., (Wash.) 210 Pac. 806; Tobacco Growers' Cooperative Association *v.* Jones, (1923) —— North Carolina ——.

In a Pennsylvania case [50] a baseball player of unusual and extraordinary ability and note who had contracted to play with a certain team, and not to play with any other, was enjoined from playing with any team other than the one with whom he was under contract. There have been many cases analogous in principle with the one just referred to in which similar conclusions were reached.[51] Emphasis in these cases is laid on the fact that the services are extraordinary and unique and that no certain pecuniary standard exists for the measurement of the damages.

In the Washington case in which the cranberry association enjoined the member from disposing of his cranberries to outside parties the court stated that it would not be proper to decree specific performance of the contract, as it would involve continuous supervisory duties by the court. However, it granted an injunction which prevented the member from selling his cranberries outside of the association and which operated to compel their delivery to the association if marketed at all, thus accomplishing indirectly through the remedy of injunction what the court declared could not be done through a decree for specific performance.

In general, an injunction can not be obtained where the remedy at law is adequate, which in most instances means that if damages will compensate the party seeking the injunction his right thereto will be denied. In a case [52] decided by the Supreme Court of the United States the court said:

> It is contended that the injunction should have been refused because there was a complete remedy at law. If the remedy at law is sufficient, equity can not give relief, but it is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.

In a case [53] decided by a Federal court in 1921, involving the right to an injunction to restrain the sale of a crop of pineapples and to obtain a decree for specific performance thereof, appears the following:

> It is true that equity will not decree the specific performance of a contract which relates to personalty in a case where compensation in damages furnishes a complete and satisfactory remedy. But the bill sets forth special circumstances, the allegations of which it is unnecessary here to repeat, that show that there was no adequate remedy at law.

Instances can easily be conceived of in which produce contracted for by a cooperative association would be vital and necessary to the successful operation of the association. Under such circumstances it is believed that a court would enjoin a member from disposing of his

[50] Philadelphia Ball Club *v.* Lajoie, 202 Pa. St. 210, 51 Atl. 973, 59 L. R. A. 227.
[51] 14 R. C. L. 386.
[52] Watson *v.* Sutherland, 72 U. S. 74.
[53] Hawaiian Pineapple Co. *v.* Sait, 270 Fed. 749.

produce outside the association in violation of his contract. Such facts would constitute the "special circumstances" just referred to.

Where a cooperative association is restricted by its charter or the statute under which it is organized to dealing with members, it would seem that this fact would strengthen the case of such a cooperative association seeking to obtain specific performance of its contract with a member for the delivery of produce, or for an injunction to prevent its breach, or both, inasmuch as the association is prevented from going into the open market to buy the produce involved.

It has been urged in certain cases that specific performance of a contract would not be decreed or an injunction issued to restrain its breach on the ground that the contract involved provided for liquidated damages. This, however, is not the general rule. Although a contract provides for liquidated damages, an injunction will be issued to restrain its breach, or specific performance will be decreed, if the other facts involved warrant such relief, unless the contract shows that damages were to be accepted in lieu of performance of the contract.[54]

Statutes have been passed in many of the States dealing with the remedies of injunction and specific performance, and these should be examined to determine their effect and scope and to ascertain how they have modified or altered the general rules on these subjects.

INCOME TAXES.

Are cooperative associations liable for Federal income taxes, and what must they do to establish their claim to exemption from such taxes? The answers to these questions will be found in the extracts from the Federal revenue act of 1921, and from the regulations issued by the Treasury Department relative to the collection of income taxes under the act, which are here given.

Under the revenue act of 1921, any corporation, and any organization, cooperative or otherwise, which properly is comprehended within the meaning of the term "association," is held to be subject to income tax unless such organization comes within one of the classes of organizations specifically exempted from taxation under section 231 of the act. That section provides in part that the following organizations shall be exempt from taxes under this title:

(10) Farmers' or other mutual hail, cyclone, or fire insurance companies, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations of a purely local character, the income of which consists solely of assessments, dues, and fees collected from members for the sole purpose of meeting expenses;

(11) Farmer', fruit growers', or like associations, organized and operated as sales agents for the purpose of marketing the products of members and

[54] Cincinnati-Louisville Theater Co. *v.* Masonic W. & O. H. and I., 272 Fed. 637; Washington Cranberry Growers' Ass'n. *v.* Moore, (Wash.) 201 Pac. 773, 204 Pac. 811.

turning back to them the proceeds of sales, less the necessary selling expenses, on the basis of the quantity of produce furnished by them; or organized and operated as purchasing agents for the purpose of purchasing supplies and equipment for the use of members and turning over such supplies and equipment to such members at actual cost, plus necessary expenses.

Article 522 of the regulations referred to reads as follows:

Cooperative Associations: (*a*) Cooperative associations, acting as sales agents for farmers, fruit growers, dairymen, etc., and turning back to them the proceeds of the sales, less the necessary selling expenses, on the basis of the produce furnished by them are exempt from income tax. Thus cooperative dairy companies, which are engaged in collecting milk and disposing of it or the products thereof and distributing the proceeds, less necessary operating expenses, among their members upon the basis of the quantity of milk or of butter fat in the milk furnished by such members, are exempt from the tax. If the proceeds of the business are distributed in any other way than on such a proportionate basis, or if the association deducts more than necessary selling expenses, it does not meet the requirements of the statute and is not exempt. The maintenance of a reasonable reserve for depreciation or possible losses or a reserve required by State statute will not necessarily destroy the exemption. A corporation organized to act as a sales agent for farmers and having a capital stock on which it pays a fixed dividend amounting to the legal rate of interest, all of the capital stock being owned by such farmers, will not for that reason be denied exemption.

(*b*) Cooperative associations organized and operated as purchasing agents for farmers, fruit growers, dairymen, etc., for the purpose of buying supplies and equipment for the use of members and turning over such supplies and equipment to members at actual cost, plus necessary expenses, are also exempt. In order to be exempt under either (*a*) or (*b*) an association must establish that it has no net income for its own account. An association acting both as a sales and a purchasing agent is exempt if as to each of its functions it meets the requirements of the statute.

If a cooperative association, otherwise exempt, deals with nonmembers on the same terms as members, including the payment to nonmembers of patronage dividends on the same terms as members, it is exempt from Federal income taxes.

Article 511 of the regulations referred to states how an association may establish its right to exemption. It reads in part as follows:

Proof of exemption.—In order to establish its exemption and thus be relieved of the duty of filing returns of income and paying the tax it is necessary that every organization claiming exemption, except personal service corporations, file an affidavit with the collector of the district in which it is located, showing the character of the organization, the purpose for which it was organized, the sources of its income and its disposition, whether or not any of its income is credited to surplus or may inure to the benefit of any private stockholder or individual, and in general all facts relating to its operations which affect its right to exemption. To such an affidavit should be attached a copy of the charter or articles of incorporation and by-laws of the organization. Upon receipt of the affidavit and other papers by the collector he will inform the organization whether or not it is exempt. If, however, the collector is in doubt as to the

taxable status of the organization he will refer the affidavit and accompanying papers to the commissioner for decision. When an organization has established its right to exemption it need not thereafter make a return of income or any further showing with respect to its status under the law, unless it changes the character of its organization or operations or the purpose for which it was originally created. Collectors will keep a list of all exempt corporations, to the end that they may occasionally inquire into their status and ascertain whether or not they are observing the conditions upon which their exemption is predicated.

In compliance with the section just quoted all associations should submit their cases to the collector of internal revenue for the district in which they are located in order that their claim for an exemption may be passed upon.

UNINCORPORATED ASSOCIATIONS.

Inasmuch as some cooperative associations are unincorporated, a discussion of the legal status of such associations and the rights and liabilities of their members is in order. Such an association may be defined to be a body of persons acting together without a charter but employing to a greater or less extent the forms and methods used by incorporated bodies for the prosecution of the object for which formed.[55]

DIFFER FROM PARTNERSHIPS OR CORPORATIONS.

The liability of members of an unincorporated association to third persons is frequently the same as that of partners, but this is not always true. In the absence of a statutory or contractual provision on the subject the death or withdrawal of a member does not dissolve the association.[56] A partnership, on the contrary, under such circumstances is dissolved by the death or withdrawal of a member.[57] Again, a corporation may sue or be sued in its own name, while at common law, and in the absence of a statute, an unincorporated association can not maintain an action in its own name but must sue in the names of all the members composing it, however numerous they may be.[58] Likewise, such an association in the absence of a statute can not be sued in its society name but the individual members must be sued.[59] A corporation may take title to property in its own name, but an unincorporated association in the absence of a statute is ordinarily incapable as an organization of taking or holding either real or personal property in its name.[60]

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[55] 5 C. J. 1333.

[56] Burke *v.* Roper, 79 Ala. 138; Lindermann, etc. Co. *v.* Stone Works, 170 Ill. A. 423; Hossack *v.* Dev. Assoc., 244 Ill. 274, 91 N. E. 439.

[57] Scholefield *v.* Eichelberger, 7 Pet. 586.

[58] St. Paul Typothetæ *v.* St. Paul Bookbinders' Union No. 37, 94 Minn. 351, 102 N. W. 725.

[59] Allis-Chalmers Co. *v.* Iron Molders' Union, 150 Fed. 155.

[60] Philadelphia Baptist Ass'n, *v.* Hart, 4 Wheat. 1, 4 L. ed. 499.

UNINCORPORATED ASSOCIATIONS—HOW FORMED.

Statutes have been passed in some States expressly authorizing individuals to unite as a voluntary association under a distinctive name, but, as a rule, the organization of unincorporated or voluntary associations is done independent of statutes. They are generally formed under the common-law right of contract. Just as A and B may enter into a contract with reference to doing some lawful act, so a larger number may associate for the accomplishment of a lawful object.

Provision may be made for any matter that is the legitimate subject of contract. The qualifications of members may be prescribed, and causes for expulsion may be specified. A constitution is usually adopted which states the objects of the association and other fundamental propositions relative to the organization. By-laws are also usually adopted which prescribe the manner in which the objects of the association are to be attained. The constitution and the by-laws, or either of them, constitute a contract binding all those who agree to them.

In a Michigan case [61] it was said, "The articles of agreement of a benevolent association, whether called a constitution, charter, by-laws, or any other name, constitute a contract between the members which the courts will enforce if not immoral or contrary to public policy or the law of the land." The foregoing was quoted approvingly in a Kansas case [62] involving an antihorse-thief association, and it is believed it states the general rule.[63] It follows that inasmuch as a voluntary association rests on a contract or contracts, the rights or liabilities of members among themselves are to be determined by the contracts involved in accordance with common-law principles as modified or supplemented by statutes; and in the absence of a constitution or by-laws the courts will apply the same legal rules for ascertaining the rights of the parties, weight being given to any usages or customs which may have been followed by the association.[64]

It should be remembered that, in order for a constitution and by-laws, or either of them, to constitute a contract between an association and one claiming or alleged to be a member, he must have agreed to them in some way, either by signing papers containing the constitution and by-laws or by assenting to them in some other way.[65] If one in joining an association signs its constitution and by-laws or assents to them in some other way and thus agrees to be bound by

[61] Brown *v.* Stoerkel, 74 Mich. 269, 41 N. W. 921, 3 L. R. A. 430.
[62] McLaughlin *v.* Wall. 86 Kans. 45, 119 Pac. 541.
[63] Kalbitzer *v.* Goodhue, 52 W. Va. 435, 44 S. W. 264.
[64] Ostrom *v.* Green, 161 N. Y., 353, 55 N. E. 919.
[65] Austin *v.* Searing, 16 N. Y. 112, 69 Amer. Dec. 665 and note.

them, he is in no position to complain because he is required to comply with the rules and regulations of the association to which he agreed or because he is expelled from the association in accordance with them.[66]

In a New York case[67] involving the New York Stock Exchange, in which it appeared that a former member had been expelled for cause, the court of appeals of that State said:

> The interest of each member in the property of the association is equal, but it is subject to the constitution and by-laws, which are the basis on which is founded the association. They express the contract by which each member has consented to be bound and which measures his duties, right, and privileges as such. It seems most clear to me that this constitution and the by-laws derive a binding force from the fact that they are signed by all members and that they are conclusive upon each of them in respect to the regulations of the mode of transaction of his business and of his rights to continue to be a member.

In another case[68] it was said:

> The San Francisco Stock and Exchange Board is a voluntary association. The members had a right to associate themselves upon such terms as they saw fit to prescribe, so long as there was nothing immoral or contrary to public policy or in contravention of the law of the land in the terms and conditions adopted. No man was under any obligation to become a member unless he saw fit to do so, and when he did and subscribed to the constitution and by-laws, thereby accepting and assenting to the conditions prescribed, he acquired just such rights, with such limitations and no others, as the articles of association provided for.

ADMISSION OF MEMBERS.

It has been previously stated that an unincorporated association may prescribe the qualifications of members. It can not be compelled to admit as members persons whom it chooses to exclude.[69] In other words, the whole matter of the admission of members rests with the association. This is well illustrated in the case of Farmers' telephone lines. The question of whether membership can be sold with the farm in such instances has arisen. It is held that an association has the right to control its membership, and a purchaser of a farm merely by virtue of his warranty deed does not become a member of such telephone company.[70]

MEMBERSHIP NONTRANSFERABLE.

Membership in an unincorporated association is not transferable unless the constitution or by-laws provide that it shall be.[71] The interest of a member in such an association is not devisable or trans-

[66] State *v.* Seattle Baseball Assn., 61 Wash. 79, 111 Pac. 1055.
[67] Belton *v.* Hatch, 109 N. Y. 593, 17 N. E. 225.
[68] Hyde *v.* Wood, (U. S.) 2 Saw. 655.
[69] Richardson *v.* Francestown Union Cong. Soc., 59 N. H. 187.
[70] Cantrill Telephone Co. *v.* Fisher, 157 Ia. 203, 138 N. W. 436.
[71] Moore *v.* Telephone Co., 171 Mich. 388, 137 N. W. 241; McMahon *v.* Rauhr, 47 N. Y. 67.

missible, and his estate receives nothing therefrom on his death[72] in the absence of a contractual or statutory provision to the contrary.

WHO CONTROL AN ASSOCIATION.

In the absence of an agreement to the contrary, within the scope of the objects for which an association was formed, whether such objects are mentioned in the constitution or other paper defining the objects of the association or necessarily implied therefrom, a majority of the members possess authority to control the action of the association.[73] The majority controls only while it is doing those things for which the association was organized. If it is desired to have the association do something different from that for which it was formed, unanimous consent is necessary.[74]

NOTICE OF MEETINGS.

Where the constitution or by-laws provide how members shall be notified of meetings, they must be followed.[75] In general, all members are entitled to notice of all meetings and of the matters to be considered at such meetings. Where matters of an unusual character are to be considered at a meeting, it is particularly important that the nature of the business be brought to the attention of each member.[76]

UNINCORPORATED ASSOCIATIONS AND THIRD PERSONS.

The liability of the members of an association which is not organized or conducted for profit has been said to rest upon the principles of agency.[77] An illustration will make this clearer. In a Massachusetts case[78] the constitution stated that the association was formed to stimulate interest in the breeding of pigeons and bantams. It gave the board of directors charge of all public exhibitions of the society and required each member to pay an initiation fee and an annual assessment. An exhibition was held, and premiums were offered. The expenses thereof were greater than the receipts. Certain of the members paid the bills. They then brought suit against other members of the association to compel them to contribute their respective proportions of the loss sustained. The court said:

> Mere membership would not bind anybody for any further payment than the initiation fee and annual assessment; but such members as participated in a vote to incur further expenses for an exhibition with premiums, or as assented to be bound by such a vote, would be bound thereby.

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[72] Sommers *v.* Reynolds, 103 Mich. 307, 61 N. W. 501; also Mason *v.* Atlanta Fire Co., 70 Ga. 604, 48 Am. R. 585.

[73] 4 Cyc. 310; Goller *v.* Stubenhaus, 134 N. Y. S. 1034.

[74] Abels *v.* McKeen, 18 N. J. Eq. 462.

[75] Kuhl *v.* Meyer, 42 Mo. App. 474.

[76] State *v.* Seattle Baseball Assoc., 61 Wash., 79, 111 Pac. 1055.

[77] 5 C. J. 1363.

[78] Ray *v.* Powers, 134 Mass. 22.

In other words, only those members were liable who authorized the exhibition with premiums or who later ratified the act of holding such an exhibition. The other members were not liable.

In a Michigan case [79] the members of a building committee of an unincorporated religious society ordered lumber of a lumber dealer for the building of a church. A dispute arose, and the lumber dealer brought suit against the members of the building committee and won. In holding the defendants liable, the court said:

> The church organization had no legal existence—it could neither sue nor be sued. The members of the society were not partners. Those of the society who were actually instrumental in incurring the liabilities for it are liable as either principals or agents having no legal principal behind them. Members of the society who either authorized or ratified the transaction are liable, while those who did not are exempt from liability.

All the authorities apparently agree that if the debt or obligation in question was necessarily incurred for the express purpose for which the association was formed each member thereof is liable. In a South Dakota case [80] the following language was used with reference to this matter:

> Each member of an unincorporated or voluntary association is liable for the debts thereof incurred during his period of membership and which had been necessarily contracted for the purpose of carrying out the objects for which the association was formed.

Where an unincorporated association is organized and operated for profit the members are generally held liable as partners to third persons. This obligation is imposed by law on the members of such an association, and it is immaterial what the rules of the association provide on the subject of liability.[81] In a California case [82] suit was brought by the plaintiff against the defendant association, which was unincorporated, and certain of its members to recover the sale price of goods purchased by the association for use in its business. The association was composed of 19 members. The defendant recovered an individual judgment against two of the members of the association, and they appealed on the ground that they could not be held individually responsible for the claim of the plaintiff. In affirming the judgment of the lower court the Court of Appeals of California said that the case came within the rule announced in volume 5, Corpus Juris, 1362, 1373, as follows:

> While, as between the members of an unincorporated association, each is bound to pay only his numerical proportion of the indebtedness of the concern, yet as against the creditors each member is individually liable for the entire

[79] Clark *v.* O'Rourke, 111 Mich. 108, 69 N. W. 147, 66 Amer. St. Rep. 389.

[80] Lynn *v.* Commercial Club of Witten, 41 S. D. 401, 141 N. W. 471; see also Little Rock Furniture Mfg. Co. *v.* Kavanaugh, 111 Ark. 575, 164 S. W. 289; Schumacher *v.* Sumner Tel. Co., 161 Iowa 326, 142 N. W. 1034.

[81] Bennett *v.* Lathrop, 71 Conn. 313, 42 Atl. 634, 71 Am. St. R. 222.

[82] Webster *v.* San Joaquin Fruit, etc., Ass'n., 32 Cal. App. 264, 162 Pac. 654.

debt, provided, of course, the debt is of such a nature and has been so contracted as to be binding on the association as a whole * * *. An unincorporated association organized for business or profit is in legal effect a mere partnership so far as the liability of its members to third persons is concerned, and accordingly each member is individually liable as a partner for a debt contracted by the association.

It should be borne in mind that the association involved in this case was organized and operated for profit and was not a nonprofit association. This case illustrates one of the serious objections to unincorporated associations, and in turn emphasizes one of the great advantages of an incorporated association in which generally the members are not liable for the debts of the association.

MONEY MUST BE USED FOR PURPOSE FURNISHED.

In a New Jersey case[83] it was said:

The vote must be for some purpose for which the money was contributed. A majority can not devote the money of the minority or even of a single member to any other purpose without his consent.

The rule that money can be used only for the purpose for which contributed appears settled.[84] In the West Virginia case just cited, a retail butchers' protective association was organized with a constitution which specified the purposes for which money could be used. Through dues paid by the members a fund of $1,800 was accumulated. There were 24 members of the association. At a regular meeting 20 were present, and by a vote of 12 to 8 an order was passed to distribute all of the money in the treasury except $100 among the members. Certain of the members who opposed this use of the money obtained an injunction preventing the distribution of the money, and the Supreme Court of the State held that although a majority of the members present at the meeting had voted in favor of the distribution, yet it could not lawfully be diverted from the purpose for which contributed, as set forth in the constitution.

EXPULSION OF MEMBERS.

It was pointed out earlier in this discussion on unincorporated associations that the rights of the members between themselves was a contractual one and that the constitution and by-laws, or either of them, constituted a contract between the members. It follows from this fact that if the constitution or by-laws assented to by the members state causes for expulsion from the association, ordinarily the courts would afford no relief if a member were expelled in good faith for such a cause.[85] This is undoubtedly the general rule.[86]

[83] Abels *v.* McKeen, 18 N. J. Eq. 462.
[84] Kalbitzer *v.* Goodhue, 52 W. Va. 435, 44 S. E. 264.
[85] Connolly *v.* Masonic Mutual Benefit Assn., 58 Conn. 552, 20 Atl. 671, 9 L. R. A. 428.
[86] See case last cited and note in 9 L. R. A. 428.

However, all rules of the association relative to expulsion must be followed.[87]

The constitution or by-laws of the association may place the entire matter of disciplining, suspending, or expelling members in a committee or like body.[88] Such a provision in the constitution or by-laws, like other legal provisions in such instruments, is binding upon all members assenting to them.

It has been said with reference to unincorporated associations that the "Courts never interfere except to ascertain whether or not the proceeding was pursuant to the rules and laws of the society, whether or not the proceeding was in good faith, and whether or not there was anything in the proceeding in violation of the law of the land."[89] It is believed this states the general rule.

WITHDRAWING OR EXPELLED MEMBERS RECEIVE NOTHING.

In the absence of a contract or statute on the subject, the rule appears to be settled that those who withdraw[90] or are expelled[91] from an unincorporated association are not entitled to compensation for their interest in the association and that they thereby lose all rights in the property of the association.[92] Although a majority of the members of an association withdraw, the right of those who remain to continue the association appears clear, and this right carries with it the right to the property of the association.[93] In a Michigan case[94] it was said:

> It has been many times decided that persons who withdraw from a voluntary association are not entitled to any portion of its property, and that those who remain have the right to the property of the association and its use so long as any of the members remain, and clearly withdrawing members ought not to decide the right of those not withdrawing to continue the association.

DISSOLUTION.

In the absence of a statutory or contractual provision to the contrary an unincorporated association can be dissolved only by unanimous consent of the members.[95] Upon the dissolution of an unincorporated association, unless otherwise provided by its rules, its property after payments of its debts should be distributed pro rata among those who were members at the time of such dissolution.[96]

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[87] Farmer *v.* Board of Trade, 78 Mo. App. 565; Kelley *v.* Grand Circle W. of W., 40 Wash. 693, 82 Pac. 1007.

[88] Harris *v.* Aiken, 76 Kan. 516, 92 Pac. 537.

[89] Kelley *v.* Grand Circle of Woodcraft, 40 Wash. 691, 82 Pac. 1007.

[90] Richardson *v.* Harsha, 22 Okla. 405, 98 Pac. 897; see also Schwartz *v.* Duss, 187 U. S. 8.

[91] Missouri Bottlers Assn. *v.* Fennerty, 81 Mo. App. 525.

[92] Cases cited above.

[93] McFadden *v.* Murphy, 149 Mass. 341, 21 N. E. 868; Altman *v.* Benz, 27 N. J. Eq. 331.

[94] Walters *v.* Pittsburgh & Lake Angeline Iron Co., 201 Mich. 379, 167 N. W. 834.

[95] Sommers *v.* Reynolds, 103 Mich. 307, 61 N. W. 501; Parks *v.* Knickerbocker Trust Co., 122 N. Y. S. 521.

[96] Cases last cited.

APPENDIX.

The suggested form of by-laws which is here given should be modified and altered to suit the individual requirements of the association using them, and, of course, should be considered with reference to the law of the State in which the association is organized.

BY-LAWS OF THE (here insert name of the association).

ARTICE I.—NAME.

SECTION 1. This association, incorporated under the laws of the State of (New York), shall be known as the (Monroe County Fruit Association). Its principal office shall be located in the town of (Hilton, County of Monroe, State of New York).

NOTE.—The name should indicate the territory covered and the class of products handled, such as the "Maine Potato Shippers' Exchange" or "Richmond Egg Circle." Some of the State cooperative laws provide that the word "cooperative" shall form part of the name of the organizations incorporated thereunder. As a general rule all associations should be incorporated under the laws of the State in which they are located.

ARTICLE II.—OBJECTS.

SECTION 1. The objects of this association shall be to encourage better and more economical methods of production; to market the products of its members; to secure better results in grading, packing, marketing, and advertising the products of its members; to buy supplies in a cooperative way; to rent, buy, build, own, sell, and control such buildings and other real and personal property as may be needed in the conduct of its operations; to cultivate and develop the cooperative spirit in the community; and to perform any other work which may tend to the betterment of the members and the general benefit of the neighborhood.

NOTE.—Make the objects as definite as possible, but it is also well to make them sufficiently broad in scope to cover any future activities of the association. Care should be taken to state the objects in such a way that the activities will be within the limits of the power conferred by the State in which the association is incorporated and in harmony with the articles of association. It may be deemed advisable to set forth in the above paragraph the objects for which the association is incorporated, as stated in its articles of incorporation.

NOTE.—All matter appearing in parenthesis is suggestive merely, and is to be altered to suit the best interests of each individual association.

ARTICLE III.—MEMBERSHIP.

SECTION 1. Any bona fide grower of farm products, in the territory tributary to the shipping points of this association of good character may become a member of the association by agreeing to comply with the requirements of these by-laws.

SEC. 2. Upon entering into such an agreement and the payment of a membership fee of ——— dollars, the association shall issue a certificate of membership to the applicant. Such certificate of membership shall not be transferable.

SEC. 3. The violation of these by-laws, or any that may hereafter be adopted, or of any contract entered into by the association with a member, shall constitute a sufficient cause for the expulsion or suspension of such a member from the association. No member shall be expelled from or suspended by, or be deprived of the benefits of the association except by a two-thirds vote of the

members present at any annual or special meeting following the mailing of a notice to each member in accordance with these by-laws, specifying that the matter of the expulsion or disciplining of such member is to be voted on at the meeting. The member shall have charges preferred against him at least (10) days in advance of such meeting and shall have an opportunity to present witnesses and to be heard in person and by counsel. Whenever the board of directors, after a hearing, determines that a member has ceased to be a bona fide producer of the products handled by the association, his membership may be terminated and his membership certificate canceled.

> NOTE.—There may be conditions that make it wise to limit membership to those who have been recommended by the board of directors, or who have received a two-thirds vote of the members present at any meeting. In some localities there are persons who can not work in harmony with their neighbors and for this reason would make undesirable members.

ARTICLE IV.—FISCAL YEAR, MEETING.

SECTION 1. The fiscal year of the association shall commence (January 1) and end on (the 31st of the following December).

> NOTE.—The fiscal year should end after the close of one season's business and before the opening of the next. Thus, a grain elevator usually has its fiscal year ending in spring or early summer, when practically all of the work of handling the previous season's business has been finished.

SEC. 2. The annual meeting of the association shall be held at the office of the association, in the town of (Hilton, N. Y.) on the (second Monday in January) of each year, at (10 o'clock a. m.).

> NOTE.—The annual meeting should be held shortly after the beginning of the fiscal year. Previous to this meeting all transactions of the fiscal year just ended should be closed, the books audited, and the annual reports of the officers prepared.

SEC. 3. Special meetings may be called at any time by the president. He shall call such meetings whenever (10) members shall so request in writing.

SEC. 4. Notice of the annual meeting shall be mailed by the secretary to each member at least (one week) previous to the date of the meeting and such notice shall be published in a local newspaper not less than (one week) previous to the date of meeting. At least (five) days before the date of any special meeting the secretary shall mail notice of such meeting to each member, which shall state the nature of the business to be transacted at such meeting.

ARTICLE V.—QUORUM.

SECTION 1. (One-fifth) of the members in good standing shall constitute a quorum for the transaction of business at any meeting.

> NOTE.—When the organization is small and compact, the proportion required for a quorum may be larger than in a large organization whose members are scattered over a wide territory.

ARTICLE VI.—DIRECTORS AND OFFICERS.

SECTION 1. The board of directors of this association shall consist of (seven) members, who shall be divided into three classes. After the adoption of these by-laws, the members shall elect from among themselves (three) directors of the first class for a term of one year, (two) directors of the second class for a term of two years, and (two) directors of the third class for a term of three years. At the expiration of the terms of the directors so elected their successors

shall be elected in like manner, for terms of three years. Directors shall hold office until their successors have been elected and qualified and have entered upon the discharge of their duties.

NOTE.—In some States the corporation laws stipulate the number of directors and officers an association shall have. The plan of having each shipping station or district represented on the board of directors helps to prevent jealousies between the various districts and strengthens the confidence of those attempting to cooperate. Some object to a director holding office for more than one year, claiming that the board might become so objectionable to the members that it would be desirable to elect an entirely new board at the annual meeting. However, there are many advantages in keeping some experienced directors on each board. In case the entire board should go contrary to the wishes of the members, the recall of each director could be effected under section 6 of this article.

SEC. 2. The board of directors shall meet within (10) days after the first election, and after each annual election, and shall elect by ballot a president and a vice president from among themselves, and a secretary-treasurer (or a secretary and a treasurer) who may or may not be a member of the association. They shall also choose three auditors from the members who are not directors, officers, agents, or employees of the association. Such officers and auditors shall hold office for one year or until their successors are duly elected and qualified.

NOTE.—Some organizations desire to have some one outside the membership act as secretary or treasurer, as for instance, a local banker. When such an arrangement is desired it should be provided for in the by-laws.

SEC. 3. Any vacancy in the board of directors shall be filled for the unexpired term by the remaining members of the board of directors, and directors so chosen shall hold office until their successors shall have been elected at a regular or called meeting of the association.

SEC. 4. (Four) members of the board of directors shall constitute a quorum at any meeting of the board of directors.

SEC. 5. (The compensation, if any, of the board of directors and the officers shall be determined by the members of the association at a regular or called meeting of the association.)

SEC. 6. Any director or officer of the association may, for cause, at any annual or at any special meeting called for the purpose, at which a majority of the members shall be present, be removed from office by vote of not less than two-thirds of the members present. Such director or officer shall be informed in writing of the charges against him at least (10) days before such meeting and at such meeting shall have an opportunity to present witnesses and to be heard in person and by counsel in regard thereto.

NOTE.—In some cases, especially when the board of directors is large, it is desirable to have an executive committee. Such a committee can be made of the officers and one or two members of the board.

ARTICLE VII.—DUTIES OF THE DIRECTORS.

SECTION 1. The board of directors shall manage the business and conduct the affairs of the association and shall make the necessary rules and regulations, not inconsistent with law or with these by-laws, for the management of the business and the guidance of the officers, employees, and agents of the association.

SEC. 2. The board of directors may employ a business manager, fix his compensation and dismiss him for cause. He shall have charge of the business of the association under the direction of the board of directors.

SEC. 3. The board of directors shall require the treasurer and all other officers, agents, and employees charged by the association with responsibility

for the custody of any of its funds or property to give bond with sufficient surety for the faithful performance of their official duties, which bond shall be paid for by the association.

SEC. 4. The board of directors shall meet on the (first Saturday) of each month at the office of the association in the town of (Hilton, N. Y.). Special meetings of the board shall be held upon call of the president or upon written request of (three) members of the board.

ARTICLE VIII.—DUTIES OF OFFICERS.

SECTION 1. The president shall—

a. Preside over all meetings of the association and of the board of directors.

b. Sign as president (with the secretary-treasurer) all checks, notes, deeds, and other instruments on behalf of the association.

c. Call special meetings of the association and of the board of directors and perform all acts and duties usually required of an executive and presiding officer.

SEC. 2. In the absence or disability of the president, the vice president shall preside and perform the duties of the president.

SEC. 3. The (secretary-treasurer) shall—

a. Keep a complete record of all meetings of the association and of the board of directors.

b. Sign (as secretary-treasurer), with the president, all checks, notes, deeds, and other instruments on behalf of the association.

c. Serve all notices required by law and by these by-laws.

d. Receive and disburse all funds and be the custodian of all the property of this association.

e. Keep a complete record of all business of the association and make a full report of all matters and business pertaining to his office to the members at their annual meeting and make all reports required by law.

f. Perform such other duties as may be required of him by the association or the board of directors.

NOTE.—When the offices of the secretary and treasurer are separate, the duties of each should be given in different sections.

ARTICLE IX.—DUTIES AND POWERS OF THE MANAGER.

SECTION 1. Under the direction of the board of directors, the manager shall employ and discharge all employees, agents, and laborers. He shall secure information as to crop and market conditions, and furnish the same to the members on request. He shall encourage the production of the best varieties of products demanded by the trade. He shall acquaint each member as far as practicable with the form and manner in which his products shall be prepared for market. He shall have charge of the grading, packing, and inspection of all products handled by the association, and shall have control of the brands and labels and their use on such products, in accordance with the rules of the association. Subject to the terms of the contracts made by the members with the association for the marketing of their products, the order of the board of directors, and the by-laws and rules of the association, the manager shall have entire charge of the sale and marketing of such products.

NOTE.—The manager is the most important officer, and the success or failure of the association will to a large degree depend upon him; hence his power must be limited as little as possible. He can not be held responsible if he is to be dictated to at will by each member or if the officers are to meddle constantly with his work. This does not imply that the manager should be a dictator. He should take the suggestions of the officers and members and from

them and his own experience construct a business plan. Whenever a manager loses the confidence of the members, he should be replaced with a manager who possesses that confidence. The duties of a manager differ with the different forms of organization and kinds of business. Therefore the duties here outlined must be considered as suggestive. Each association should redraft this provision to suit its purposes. Organizations like creameries and cheese factories may find it advisable to insert an article relating to the duties of the butter maker or cheese maker, as in such organizations the duties of the manager usually are more limited.

ARTICLE X.—MEMBERSHIP FEE AND FINANCE.

SECTION 1. Each member shall pay in advance to the association a membership fee of ($5).

SEC. 2. At the time of uniting with the association or at any time thereafter when called upon by the board of directors each member shall loan an amount to be fixed by the board, not less than ($10) nor more than ($100), in cash to the association to be used in building warehouses or other necessary buildings and the lease or purchase of lands therefor or in securing necessary equipment.

SEC. 3. Such loans shall draw interest at the rate of (6) per cent per annum.

SEC. 4. Such loans shall be repaid from a special fund created by levying a percentage assessment on the produce sold and supplies bought through the association, the amount of such percentage to be fixed by the board of directors, which amount shall be sufficient to pay (one-fifth) of the entire loan and the interest thereon in each year.

SEC. 5. At the end of each fiscal year each member shall receive a certificate showing the amount of money which he has contributed that year to the special loan fund. During the life of the association, or until this by-law is changed, the special assessments shall continue and the holder of such certificates issued in previous fiscal years, out of the proceeds arising therefrom, shall be paid the amounts due thereon.

NOTE.—This article suggests a method which nonstock organizations may employ to secure the capital necessary to build warehouses or purchase equipment. Organizations which require only a small outlay for equipment can provide the necessary capital through the membership fee.

ARTICLE XI.—EMERGENCY CAPITAL.

SECTION 1. At the time of uniting with the association, or any time thereafter when called upon by the board of directors, each member, in consideration of the maintenance and operation of the association, shall give a negotiable promissory note, payable on demand to the order of the association. Such note shall be for the sum of ($25) and an additional ($1) for each acre of land farmed by the member, the products of which are to be marketed through the association. But in no case shall this note be for less than ($35).

SEC. 2. Such note shall be the property of the association for the purpose of being pledged by the board of directors as collateral security for any loan that may be necessary in the conduct of the association's business and also for the purpose of securing the payment of any debt or claim due by the member to the association. And such note shall retain its negotiable character without reference to the date of its negotiation.

NOTE.—This article is intended to supply capital which is needed only for short periods; for example, during the harvesting and shipping period and other periods when a temporary supply of money is required. The exact legal status of notes of this character in the State where they are to be employed should be ascertained.

Article XII. Grading and Inspecting.

Section 1. All products grown by the members for sale through the association shall either be graded and packed on the growers' premises, in accordance with the rules of the association, subject to such inspection as may be established by the board of directors, or shall be delivered to the association, as directed by the manager, in prime conditions for grading, packing, and shipping.

Sec. 2. All produce offered for shipment shall be inspected before shipment. If any produce is not of good quality and in good condition for shipping, such produce shall be sorted and prepared for shipment at the expense of the owner.

Sec. 3. All brands, labels, trade-marks, and the like established by the association shall be registered and become its property, and they shall be attached only to such grades as shall be approved by the board of directors.

> Note.—The nature of organization and the kind of business engaged in should be kept in mind, and the grading and inspecting rules given in this article adapted to fit the requirements of the organization and the products handled.

Article XIII.—Contracts and Agreements.

Section 1. Every member of this association shall enter into a contract with the association in the form required by the board of directors, subject to the following provisions:

(*a*) That the member, by said contract, appoints the (Monroe County Cooperative Fruit Association) his sales agent to sell all products grown by him for sale, or such part thereof as shall be specified in the contract, and binds himself to deliver such products to the (Monroe County Cooperative Fruit Association) for sale at such time and place as the rules fixed by the board of directors of the association may direct.

(*b*) That said contract shall run continuously unless canceled by the member on (April 1) of any year by giving written notice to that effect to the association at least (30) days prior to said date and by delivering his copy of the contract to the association on or before that date. Such cancellation shall be subject to any indebtedness due from him to the association.

> Note.—No cooperative association should attempt to do business without definite contracts with its members. The manager can not be expected to work to advantage unless he has definite knowledge of the quantity and kinds of products he is expected to market, and this knowledge should be in his possession early in the season. Unless a member is willing to bind himself under an enforceable contract he can not expect his association to transact business to his advantage.

Article XIV.—Duties and Rights of Members.

Section 1. A member shall have the right to give away or retain for his own use such of his farm products as he may wish, but he shall not sell any products contracted to the association to an outside party, except products offered to and rejected by the association.

Sec. 2. Any member who receives an offer for his farm products which is greater than the price presently obtainable through the association may submit this offer to the manager. If deemed advisable, the manager may authorize the member to accept the offer, but payment for the products shall be made to the association. Products sold in this manner shall bear their proportional share of the association's expenses, and settlement therefor shall be made to the member in accordance with Article XVI, section 2, of these by-laws.

Sec. 3. Each member shall have a number or mark which shall be permanently stamped on every sack, box, barrel, crate, basket, or other container,

packed by him or under his direction, for shipment through the association. Any loss occasioned by improper packing or grading shall be charged to the member whose mark is found on said package.

NOTE.—Products packed on the growers' premises should be inspected by an association inspector. The inspector must be accountable only to the association. His private mark should be placed upon each package he inspects, and he should be held jointly responsible with the grower for the grade and condition of the pack as disclosed in the market.

SEC. 4. On or before (April 1) of each year each member shall report to the association the acreage of products to be grown by him that year for sale through the association. During the growing season each member shall furnish such information concerning the crops contracted to the association as may be required by the manager.

NOTE.—This section is intended for organizations handling perishable products, such as fruit and vegetables, where it is important to know the volume of business to be handled.

SEC. 5. Each member of the association shall have only one vote. No member shall be allowed a vote so long as any past-due debts or obligations owing by him to the association remain unpaid. Voting by proxy shall not be permitted. Except in case of the removal of a director or officer, as provided in Article VI, Section 6, of these by-laws, absent members may vote on specific questions by ballots transmitted to the secretary of the association by registered mail, and such ballots shall be counted only in the meeting at the time at which such vote is taken.

NOTE.—In a stock company, which is organized to earn profits on the money invested in the business, a member generally votes in proportion to the number of shares he holds, but a true cooperative association is based on the individual member, a number of whom unite to do something in which they have a common interest. In the former, money controls; in the latter, men. While there may be cases where the voting power of the members may be made in proportion to the acreage of their products, it will generally be found that any attempt to vary the voting power of members will be unwise. The practice of allowing a member to collect the proxies of absent members and vote the same tends to give a single member influence in the association which is too dangerous to be allowed.

In some of the largest nonprofit cooperative associations it has been felt that it was neither fair nor wise to demand that the large-producing member should be held to the same vote as a small-producing member, as their responsibility and interest are so unequal. In such a case the voting power of members may be proportioned according to the amount of their products or acreage handled through the association.

SEC. 6. Any member may withdraw from the association at any time during the month of January of any year, but such withdrawal shall not affect any right or lien which the association has against the retiring member or his property until his indebtedness to the association is fully paid. Any member having a grievance or complaint against the association may appeal to the board of directors (or to the members at any regular or called meeting).

NOTE.—The time of withdrawal should be so fixed as to take effect some time between the close of one season's business and the opening of the next. To permit a member to withdraw during a busy marketing season will result in confusion and may seriously handicap the manager in filling his contract.

The laws of several of the States providing for the incorporation of cooperative associations require that the by-laws shall provide the manner of ascertaining a member's interest upon his death, withdrawal, or expulsion. This subject should be investigated

and, if required, provision made therefor. The following by-law is suggested when found necessary:

On the death, withdrawal, or expulsion of a member his interest in the association shall be conclusively ascertained and determined by appraisal by the board of directors, and the association shall pay the amount thus ascertained to the member or his legal representative within one year from the date of appraisal.

ARTICLE XV.—INDEBTEDNESS, MEMBERSHIP LIABILITY.

SECTION 1. The amount of indebtedness which may be incurred by or on behalf of this association shall at no time exceed ($20,000).

ARTICLE XVI.—EXPENSES AND PAYMENTS.

SECTION 1. The expense of operating the association shall be met by a percentage charge laid upon returns for produce sold, or by a uniform fixed price per package; and upon supplies purchased, the amount of such charge to be fixed by the board of directors.

SEC. 2. The association may pool or mingle the products of each member with products of like quality, variety, and grade delivered by other members. The net returns from the sale of such products less such costs, advances, reserves, and charges as are provided for in these by-laws and the rules prescribed by the board of directors shall be credited and paid to each member in proportion to the quantity of such products shipped by him through the association, and on the basis of the average price received for such products of like quality, variety, and grade during such period or periods as the board of directors from time to time may determine.

NOTE.—It is important that an average price should be paid for products of the same grade shipped during a specified period. In this way inequalities and dissatisfaction are avoided, and the association is better able to serve the interests of the entire membership.

ARTICLE XVII.—COOPERATIVE PURCHASE OF SUPPLIES.

SECTION 1. All merchandise purchased by the association for any member shall be paid for in cash by the member ordering such supplies at the time the order is placed.

NOTE.—Without such a provision an organization purchasing supplies for its members may find that some of the members will refuse to take supplies ordered or else will not pay promptly. A cooperative organization should extend credit to no one unless it is amply secured.

SEC. 2. If local dealers handle the supplies desired, they shall be given an opportunity to bid on the order before it is placed with an outside agency.

NOTE.—In the cooperative plan of buying farm supplies the local dealer should be given consideration and an opportunity to submit terms and prices.

ARTICLE XVIII.—SAVINGS AND DAMAGES.

SECTION 1. After the season's expenses are paid and a proper sum set aside to cover the depreciation of the association's property and provision is made for a reserve fund to be fixed by the board of directors, the balance of the season's returns on products sold shall be divided among members and nonmember patrons, if any, in proportion to the value of their products sold through the association, and the balance of the season's savings on supplies purchased shall be divided in like manner. In the case of a nonmember patron, any part of such sums of money may be applied, with his consent, to the payment of membership fees and dues for him; and, if so applied, when such fees and dues are fully paid a membership certificate shall be issued to him. When any nonmember offers his products and the association accepts them for sale, such offer and acceptance shall be deemed an application for membership, if the nonmember agrees that it shall be so considered.

SEC. 2. Any member who fails or refuses to deliver his fruits and vegetables to the association in accordance with the contract entered into by him with the association shall pay to the association the sum of_____for each _____of_____not delivered by him to compensate the association for its expenditures in providing and maintaining for him the machinery, equipment, facilities, personal services, and information necessary to market his crop. And in addition thereto, he shall be liable to the association for all damages suffered by it as a result of the breach of the contract. All contracts entered into by the association with members for the delivery of produce contemplate the delivery of such produce and not the payment of compensation in lieu thereof.

NOTE.—Many organizations have failed because members were bound only by a "gentleman's agreement," which is totally inadequate for a stable and enduring organization. The laws of the State should be studied to ascertain the status of a provision of this kind.

ARTICLE XIX.—ACCOUNTS AND AUDITING.

SECTION 1. This association shall install a standard system of accounts and provide other accounting appurtenances that may be necessary to conduct the business in a safe and orderly manner.

NOTE.—The Bureau of Agricultural Economics has devised systems of accounts for several types of cooperative business, such as grain elevators, fruit organizations, creameries, live-stock shipping associations, and stores. Information in regard to systems of accounts may be obtained by writing to the Bureau of Agricultural Economics, U. S. Department of Agriculture.

SEC. 2. The books and business of the association shall be audited quarterly by the auditors selected from the membership. A complete annual audit shall be made by a competent accountant previous to the date of each annual meeting, at which meeting his report shall be presented in full. Special audits shall be made upon order of the board of directors or upon a majority vote of the members at any regular or called meeting.

SEC. 3. This association shall endeavor to cooperate with other farmers' cooperative associations in this locality in securing the services of a competent accountant for its annual audit.

NOTE.—While small associations may not feel the need of such a strict system of investigating their accounts, it will pay to have this work done often and thoroughly. If the business of the association is being conducted carelessly, frequent audits will make this fact known, and better methods may be adopted before any great loss occurs. An audit by an expert accountant gives the members confidence in the business methods of the manager and directors.

ARTICLE XX.—AMENDMENTS.

SECTION 1. These by-laws may be amended at any meeting by a two-thirds vote in the affirmative of the members present, provided that notice of the proposed amendment is included in the call for said meeting.

ASSOCIATIONS FORMED WITH CAPITAL STOCK.

Organizations which are formed with capital stock should replace Articles III and X of the suggested by-laws for organizations without capital stock with the following articles:

ARTICLE III.—MEMBERSHIP.

SECTION 1. Any (bona fide) grower of farm products in any territory tributary to the shipping points of this association may become a member of the

association by agreeing to comply with the requirements of these by-laws and purchasing at least one share of capital stock of the association.

NOTE.—See note following Article III of the by-laws for organizations without capital stock.

ARTICLE X.—CAPITAL STOCK.

SECTION 1. The capital stock of this association shall be $5,000, divided into 500 shares of $10 each.

SEC. 2. No member shall hold more than 10 per cent of the capital stock of the association.

SEC. 3. No stock shall be issued or delivered by the association to any subscriber until he has paid the full price therefor.

SEC. 4. Transfers of shares will be made upon the books of the association only when the stockholder is free from indebtedness to the association.

SEC. 5. Whenever any stockholder desires to sell his stock he shall first offer it to the association for purchase by it or by a person or persons designated by the board of directors of the association at a price to be conclusively determined by the board of directors. In the event the stock is not purchased by the association, or by a person or persons designated as aforesaid, within 30 days after the receipt of a written notice by the association offering the stock for sale, then the stockholder may sell the stock to any person engaged in the production of agricultural products. This restriction on the transfer of stock shall be printed on every certificate of stock.

SEC. 6. If any member shall by purchase or by the operation of law come into possession of more than ——— shares of the capital stock of this association, the board of directors may elect to purchase, and such member shall then sell to the association such excess shares at a price to be conclusively determined by the board of directors, plus any dividends or refunds due and unpaid. Also, in the event of the death or disability of the owner of any shares of stock in this association such shares of stock may be purchased by the association and shall, in the event the board of directors elects to purchase them, be sold by the legal representatives of such owner to the association at a price to be conclusively determined by the board of directors, plus any dividends or refunds due and unpaid.

NOTE.—The law of the State in which the association is organized should be carefully examined to determine the status of sections 4, 5, and 6 of this article. In general, provision should be made for them in the charter in order that they may be legal.

FORM OF CONTRACT.

The form of contract which is here given is simply suggestive and is designed to serve only as a guide in the preparation of a contract for use by an association, and, of course, like the form of by-laws, should be considered with respect to the law of the State where the association is to operate.

THE _____ COOPERATIVE ASSOCIATION.

STANDARD FORM OF CROP CONTRACT.

THIS AGREEMENT, made and entered into at _____ on this _____ day of _____, A. D. 19__, between the _____ Association, formed under the laws of the State of _____, having its principal place of business at

_____, in the said State (hereinafter referred to as the association), and _____, a grower of (fruit and vegetables) of _____, county of _____, State of _____ (hereinafter referred to as the grower), witnesseth:

That for and in consideration of the expenses to be incurred by the association in providing means and facilities for handling, storing, and marketing (fruits and vegetables), including the expense of locating, organizing, and establishing markets, and in further consideration of the mutual obligations and promises of the respective parties hereto, it is hereby agreed as follows:

1. That the grower appoints said association his agent, and the association hereby agrees to act as such for the purpose of handling, packing, storing, and marketing all the (fruits and vegetables) which shall be grown for shipment and sale by the grower or for him, whether as landlord or tenant or otherwise, in the county of _____, State of _____, and that he will harvest and will deliver all his marketable (fruits and vegetables) at the association's shipping station at _____, in said State, in such quantities and conditions and at such times as the rules fixed by the board of directors of the association may direct, during the year 19__, and every year thereafter continually. On or before (April 1) of each year the grower shall report to the association the acreage to be grown by him during that year of (fruits and vegetables) covered by this contract. During the growing season the grower shall also furnish such information concerning said (fruits and vegetables) as may be requested by the manager.

2. That either party may cancel this contract on the first day of (April)[96] of any year by giving notice in writing to that effect to the other party at least thirty (30) days prior to said date. Upon such notice the grower shall, prior to said first day of (April), pay or satisfactorily secure any indebtedness then due from him to the association and deliver his copy of said contract to the association; such cancellation shall not affect any incompleted sales or transactions between the parties hereto, nor release either from any indebtedness then unpaid or thereafter accruing under this contract, nor relieve the grower from his obligation to sell through the association, nor the association of its obligation to handle all the (fruits and vegetables) described in section 1 which were grown during the preceding season. It is expressly agreed that this contract shall be binding upon the legal representatives of the grower.

3. That harvesting, grading, inspecting, packing, storing, and shipping of the (fruits and vegetables) shall be done in accordance with the by-laws and rules of the association.

4. That all (fruits and vegetables) delivered by the grower may be marketed in assorted lots or with other (fruits and vegetables) of like quality, variety, and grade, and the net proceeds of any or all of such shipments may be prorated during such period or periods as the board of directors from time to time may determine.

5. That the association shall have a lien upon the (fruits and vegetables) hereby contracted by the grower to be delivered to the association for any indebtedness of any kind owing by him to the association, and any such indebtedness shall be deducted out of the net proceeds of the sale of such (fruits and vegetables).

6. That the grower will not sell or otherwise dispose of his (fruits and vegetables) covered by this contract to any purchaser except through the association unless such (fruits and vegetables) have been rejected by the association. In case the grower is offered a price in excess of the price presently ob-

[96] This date should, if possible, be after the closing of one season's business and before the opening of the next.

tainable by the association he may submit such offer to the manager. If deemed advisable the manager may authorize the member to accept the offer, but payment for the product shall be made to the association.

7. That the (fruits and vegetables) covered by this contract shall be marketed by the association wherever a market may be found which in its judgment and in accordance with its by-laws and rules shall justify such marketing. The association shall not be liable for any damage that may be sustained through act of God or public enemy, or accidents in shipment or storage, or unavoidable failure to secure suitable storage or markets for the proper handling and storing and marketing of said (fruits and vegetables). Any loss occasioned by the grower shall be borne by him.

8. That the grower will pay the association its regular charges for its services, including handling, storing, shipping, and marketing, which charges are to be fixed by the board of directors of the association, and which shall be in amount sufficient to pay all expenses of rendering such service, including the overhead expenses of the association. The grower gives the association the right to deduct the amount necessary to cover such charges from the returns received from his (fruits and vegetables).

9. Any member who fails or refuses to deliver his (fruits and vegetables) to the association in accordance with this agreement shall pay to the association the sum of _____ for each _____ of _____ not delivered by him to compensate the association for its expenditures in providing and maintaining for him the machinery, equipment, facilities, personal service, and information necessary to market his crop. And, in addition thereto, the grower shall be liable to the association for all damages suffered by it as a result of the breach of the contract. This contract contemplates the delivery of the (fruits and vegetables) covered thereby, and not the payment of compensation in lieu thereof.

10. That the association shall have power to borrow money in its name and on its own account on the (fruits and vegetables) consigned to it, products manufactured therefrom, or on any accounts of the sale thereof, or any drafts, bills of lading, bills of exchange, notes, acceptances, or any commercial paper held by it, and to pledge in its own name and on its own account drafts, bills of lading, bills of exchange, notes, acceptances, or any commercial paper as collateral.

11. That there are no oral or any other conditions, promises, covenants, representations, or inducements in addition to, or at variance with any terms hereof, and that this agreement represents the voluntary and clear understanding of both parties fully and completely.

IN WITNESS WHEREOF the said parties have executed this contract in duplicate.

_____,
Grower.

_____, COOPERATIVE ASSOCIATION,

By _____,
President.

Attest:

_____,
Secretary.

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